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898  
No. 2422

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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H. K. LOVE, U. S. MARSHAL,

Plaintiff in Error,

vs.

VASO PAVLOVICH,

Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error from United States District Court of  
the Territory of Alaska, Fourth  
Division.

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**FILED**

MAY 18 1914





No. \_\_\_\_\_

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**Circuit Court of Appeals**  
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**Upon Writ of Error from United States District Court of  
the Territory of Alaska, Fourth  
Division.**

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Due service and receipt of three copies hereof admitted this.....<sup>22<sup>nd</sup></sup>.....day of April, 1914.

*H. A. Day & Morton E. Stevens*  
Attorneys for Defendant in Error.

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James a.  
876

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**Names and Addresses of Attorneys of Record.**

H. A. DAY and M. E. STEVENS, Attorneys for  
Plaintiff and Defendant in Error, Fairbanks,  
Alaska.

McGOWAN & CLARK, Attorneys for Defendant  
and Plaintiff in Error, Fairbanks, Alaska.

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In the District Court for the Fourth Division of the  
Territory of Alaska.

No. 1785.

VASO PAVLOVICH,

Plaintiff,

vs.

H. K. LOVE,

Defendant.

---

[Title of Court and Cause.]

**Stipulation Relative to Printing Record.**

IT IS HEREBY STIPULATED that in printing the papers and records to be used on the hearing of the writ of error in the above entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the court and cause in full in all papers shall be omitted, except on the first page of said record, and that there shall be inserted in place of said title, the words "Title of court and cause"; also that the indorsements on all papers, except the Clerk's filing marks, and admissions of service need not be printed; and also that the verifications of all pleadings may be



omitted and the words "duly verified" inserted in place thereof.

Fairbanks, Alaska, March 23, 1914.

MORTON E. STEVENS, H. A. DAY,

Attorneys for Plaintiff.

McGOWAN & CLARK,

Attorneys for Defendant.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div., Mar. 23, 1914. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Amended Complaint.**

Comes now the said plaintiff and filing this his amended complaint by leave of Court, complains of said defendant, and for cause of action alleges:

I.—That during all the times hereinafter mentioned said defendant was the United States Marshal for the Fourth Division of the Territory of Alaska.

II.—That heretofore, to-wit, on the 24th day of May, 1912, and for a long time prior thereto, said plaintiff was the owner and in the actual possession, and entitled to possession and is still the owner and entitled to the possession of one hundred and ninety-three cords of 4 foot birch wood on Discovery claim on Chatanika Flats, in Fairbanks Precinct, Alaska, which said wood was on said 24th day of May, 1912, worth the sum of twelve dollars per cord, amounting to the sum of twenty-three hundred and sixteen (\$2,316.00) dollars.

III.—That on said 24th day of May, 1912, said de-

fendant as such United States Marshal unlawfully took said wood from the possession of said plaintiff and converted the same to his own use, to the damage of said plaintiff in the sum of twenty-three hundred and sixteen (\$2316.00) dollars.

WHEREFORE, said plaintiff prays judgment in his favor and against said defendant for the sum of twenty-three hundred and sixteen (\$2316.00) dollars and costs of suit.

H. A. DAY,  
Attorney for Plaintiff.

(Duly Verified )

Service by copy accepted this 14th day of Dec., 1912.

Verification waived until day of trial.

McGOWAN & CLARK,  
Attys. for Deft.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div., Dec. 17, 1912. C. C. Page, Clerk. By P. R. Wagner, Deputy.

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[Title of Court and Cause.]

**Answer.**

Now comes the defendant in the above entitled action and answering plaintiff's amended complaint on file herein admits, denies, and avers as follows:

I.

(a) Admits the matters and allegations set forth in paragraph one of plaintiff's said amended complaint.

(b) Denies generally the matters and allegations set forth in paragraphs two and three of said amended complaint.



## II.

For a further and separate answer and defense to plaintiff's said amended complaint, defendant alleges as follows:

(a) That, during all the times herein mentioned, this defendant was, and still is, the duly appointed, qualified and acting United States Marshal in and for the Fourth Judicial Division of the Territory of Alaska.

(b) That, on or about the 17th day of May, 1912, an action was duly commenced, in the Commissioner's Court in and for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, at Chatanika, by one Paul Ringseth, against Sam Vlik & Company, a copartnership, to recover the sum of \$1,000.00, alleged to be due on an express contract for the payment of money, to wit, a balance due on an open account for goods, wares, and merchandise, sold and delivered.

(c) That, on said date, a summons in due form was regularly issued in the action aforesaid, and, on the same date, was duly and regularly served on the defendants in said action, by the defendant herein, in his capacity as United States Marshal aforesaid, by delivering to Dan Vlik, a member of said copartnership of Vlik & Company, personally, a true copy of said summons, to which was attached a copy of the complaint filed in said action, duly certified as required by law, and which service was made at Chatanika, Alaska, and within the jurisdiction of said Commissioner's Court.

(d) That, on the date aforesaid and after the issuance of the summons aforesaid, a writ of attachment was duly issued, given, and made by the said Commissioner's Court, in the last named action, and placed in the hands of defendant herein, as United States Marshal aforesaid, and that, by virtue of said writ of attachment, defendant herein did, in his capacity aforesaid, on said 17th day of May 1912, serve and execute the said writ of attachment, by delivering a true copy thereof, duly certified, to Dan Vlik, a member of said copartnership defendant, and by levying on and seizing all the right, title, and interest of the said defendants in, to, and out of one certain lot of wood, situate near the boiler-house on Discovery Claim, Chatanika River, the said wood being a part of the wood mentioned in plaintiff's complaint herein, and which said wood was, at the time of the seizure aforesaid, in the possession of the defendant Sam Vlik & Company, in the action hereinbefore mentioned.

(e) That, thereafter, such proceedings were had in the action last aforesaid, before the said Commissioner's Court at Chatanika aforesaid, that, on the 24th day of May 1912, a judgment was duly given, made, and entered by said Court, in said action, in favor of said Paul Ringseth, the plaintiff therein, and against said defendants Sam Vlik & Company, for the sum of \$1000.00, together with interest at the rate of 8 per cent per annum until paid, and costs taxed at \$18.70.

(f) That, thereafter and on said 24th day of May



1912, an execution in due form was regularly given and made by said Commissioner's Court, in the aforesaid action, which execution was, on the 25th day of May 1912, placed in the hands of this defendant, in his capacity as United States Marshal aforesaid, for execution.

(g) That this defendant, in his said capacity as United States Marshal, as aforesaid, by virtue of said execution, did, on said 25th day of May 1912, duly levy on all the right, title, and interest of said Sam Vlik & Company, defendants named therein, in, to, and out of one hundred cords more or less of 4-foot birch wood, situate on Discovery Claim, Chatanika Flats, being the wood hereinbefore mentioned, and being part of the wood mentioned in plaintiff's amended complaint, the said wood then being in the possession of this defendant, in his capacity as United States Marshal aforesaid, under and by virtue of the writ of attachment hereinbefore alleged, by seizing and taking into his possession the said wood, together with other personal property adjacent thereto, and posting notices of Marshal's sale in three public places, as required by law, to wit, one on said wood at the place aforesaid, a second on a post near the Grand Hotel in Chatanika, and a third on the door of the postoffice at Cleary, the last named two places being within 5 miles distant from said property, and which said notices provided that the said wood should be sold by defendant herein, in his capacity as United States Marshal aforesaid, at a sale to be held at the place where said wood was

situate, on said Discovery claim, on the 6th day of June 1912.

(h) That this defendant, after posting the notices aforesaid, caused said wood to be measured, and found the exact number of cords of said wood, so levied on and attached as aforesaid, to be 123 cords of 4-foot birch wood.

(i) That this defendant, on said 25th day of May 1912, duly advertised all said wood for sale, by posting notices in the manner aforesaid, which notices provided that the said property would be sold on the 6th day of June 1912, at the hour of 2:00 p. m., at the boiler-house on the Sam Vlik & Company, lease on Discovery Claim aforesaid, and that, on said 6th day of June 1912, between the hours of 2:00 and 3:00 p. m., at the place aforesaid, this defendant, in his capacity as United States Marshal aforesaid, under and by virtue of the execution aforesaid, exposed for sale at public auction, and did sell at public auction, to the highest and best bidder for cash, all the right, title, and interest of said defendants, Sam Vlik & Company, in, to, and out of said 123 cords of 4-foot birch wood, for the sum of \$1,076.25, said sale being at the rate of \$8.75 for each and every cord of said wood so sold, which said sum, less the sum deducted by defendant herein for his fees as United States Marshal aforesaid in connection with the levies aforesaid, was credited and applied in satisfaction of the execution and judgment aforesaid.

(j) That, as this defendant is informed and believes and so alleges, at the time of the levy of the



writ of attachment hereinabove mentioned, the said wood, so levied on and sold by him as aforesaid, was in the exclusive possession of Sam Vlik & Company, the defendants in the action hereinbefore mentioned, and that said Sam Vlik & Company were in possession of the said wood and were the owners thereof at all the times hereinbefore mentioned.

### III.

For a further, separate, and second answer and defense to plaintiff's said amended complaint, defendant alleges as follows:

(a) That, during all the times herein mentioned, this defendant was, and now is, the duly appointed, qualified, and acting United States Marshal in and for the Fourth Judicial Division of the Territory of Alaska.

(b) That, on or about the 17th day of May 1912, an action was duly commenced, in the Commissioner's Court in and for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, at Chatanika, by one Jack McLean, against Sam Vlik & Company, a copartnership, to recover the sum of \$1000.00, alleged to be due on an express contract for the payment of money, to wit; a balance due for wages and for moneys advanced and paid out for defendants.

(c) That, on the 18th day of May 1912, a summons in due form was regularly issued in the action aforesaid, and, on the same date, was duly and regularly served on the defendants in said action, by the defendant herein, in his capacity as United States Marshal aforesaid, by delivering to Dan Vlik, a a mem-

ber of the copartnership of Sam Vlik & Company, personally, a true copy of said summons, to which was attached a copy of the complaint filed in said action, duly certified as required by law, and which service was made at Chatanika, Alaska, and within the jurisdiction of said Commissioner's Court.

(d) That, on the date aforesaid and after the issuance of the summons aforesaid, a writ of attachment was duly issued, given, and made, by the said Commissioner's Court, in the last named action, and placed in the hands of defendant herein, in his capacity aforesaid, on said 18th day of May 1912, and that, by virtue of said writ of attachment, defendant herein did, in his capacity aforesaid, on said date, serve and execute the said writ of attachment, by delivering a true copy thereof, duly certified, to Dan Vlik, a member of the said copartnership defendant, and by levying on and seizing all the right, title, and interest of the said defendants in, to, and out of one lot of wood and provisions, situate on Discovery Claim, Chatanika River, the said wood being a part of the wood mentioned in plaintiff's complaint herein, and which said wood was, at the time of the seizure aforesaid, in the possession of the defendants Sam Vlik & Company, in the action hereinbefore last mentioned.

(e) That thereafter such proceedings were had in the action last aforesaid, before the said Commissioner's Court at Chatanika aforesaid, that, on the 24th day of May 1912, a judgment was duly given, made, and entered by said Court, in said action, in favor



of said Jack McLean, the plaintiff therein, and against the defendants Sam Vlik & Company, for the sum of \$1,000.00, together with interest at the rate of 8 per cent per annum until paid, and costs taxed at \$18.70.

(f) That, thereafter and on the 11th day of June 1912, an execution in due form was regularly given, and made by said Commissioner's Court, in the aforesaid action, which said execution was, on the 12th day of June 1912, placed in the hands of this defendant, in his capacity as United States Marshal aforesaid, for execution.

(g) That this defendant, in his capacity as United States Marshal, as aforesaid, by virtue of said execution, did, on the 14th day of June 1912, duly levy on all the right, title, and interest of said Sam Vlik & Company, defendants named therein, in, to, and out of forty cords more or less of birch and spruce wood, one large tent, one cooking stove, all cooking utensils, provisions, etc., belonging to said defendants, being the wood hereinbefore mentioned and being part of the wood mentioned in plaintiff's amended complaint, the said wood and other property above mentioned being then in the possession of this defendant, in his capacity as United States Marshal, as aforesaid, under and by virtue of the writ of attachment hereinbefore alleged, by seizing and taking into his possession the said wood and other personal property aforesaid, and by posting notices of Marshal's sale in three public places, as required by law, to wit, one on the boiler-house on the Sam Vlik and Company lease on said Discovery claim, a second

at the town of Chatanika, and a third at the post-office at Cleary, the last named two places being within five miles distant from said property, which said notices provided that the said property should be sold by defendant herein, in his capacity as said United States Marshal aforesaid, at a sale to be held at the place where said property was situate, on said Discovery claim, on the 25th day of June 1912.

(h) That this defendant, after posting the notices aforesaid, caused said wood to be measured, and found the exact number of cords of said wood, so levied on and attached as aforesaid, to be 40 cords of birch and spruce wood.

(i) That this defendant, on said 12th day of June 1912, duly advertised said wood for sale, by posting notices in the manner aforesaid, which notices provided that the said property would be sold on the 25th day of June 1912, at the hour of 2:00 p. m., at the boiler-house on the Sam Vlik & Company lease on Discovery Claim aforesaid, and that, on said 25th day of June 1912, between the hours of 2:00 and 3:00 p. m., at the place aforesaid, this defendant, in his capacity as United States Marshal aforesaid, under and by virtue of the execution aforesaid, exposed for sale at public auction, and did sell at public auction, to the highest and best bidder for cash, all the right, title, and interest of said defendants, Sam Vlik & Company, in, to, and out of said 40 cords of birch and spruce wood and the other personal property aforesaid, for the sum of \$275.00, which said sum, less the sum deducted by defendant herein for



his fees as United States Marshal in connection with said levies, was credited and applied on said execution and judgment aforesaid.

(j) That, as this defendant is informed and believes and so alleges, at the time of the levy of the writ of attachment hereinbefore mentioned, the said wood and other personal property, so levied on and sold by him as aforesaid, was in the exclusive possession of said Sam Vlik & Company, the defendants in the action hereinabove mentioned, and that said Sam Vlik & Company were in the possession of the same and were the owners thereof at all the times hereinbefore mentioned.

#### IV.

For a further, separate, and third answer and defense to plaintiff's said amended complaint, defendant alleges as follows:

(a) That, under and by virtue of the attachments and executions in the cases of Paul Ringseth against Sam Vlik & Company and Jack McLean against Sam Vlik & Company, he seized, took into his possession, and sold, one hundred sixty three cords of four foot wood on Discovery Claim, Chatanika River, and no more.

#### V.

For a further, separate, and fourth answer and defense to plaintiff's said amended complaint, defendant alleges as follows:

(a) That, as defendant is informed and believes and so alleges, the plaintiff herein, long prior to the 17th day of May 1912, sold to said Sam Vlik & Com-

pany, and delivered to them on Discovery Claim aforesaid, a large number of cords of four-foot birch wood, and the said Sam Vlik & Company, for a long time prior to said 17th day of May 1912, were in the actual possession and were the owners of all said wood so delivered to them by plaintiff herein, and that the 163 cords of wood levied on and sold by defendant herein, under the process in this answer above set forth, was a part and parcel of the wood so sold and delivered by said plaintiff to said firm of Sam Vlik & Company.

(b) That, on or about the 18th day of May 1912, the said Sam Vlik & Company, being a copartnership composed of Sam Vlik, Dan Vlik, and Mike Onok, doing business under the firm name and style of Sam Vlik & Company aforesaid, were indebted to said Paul Ringseth and to said Jack McLean, as well as to numerous other persons, in large sums of money and were insolvent, and that, prior to the said date, to wit, on the 17th day of May 1912, the said Paul Ringseth and the said Jack McLean had commenced actions at law against the said Sam Vlik & Company, for the recovery of the amounts due to them, as in this answer above more fully appears.

(c) That, as this defendant is informed and believes and so alleges, on or about the 18th day of May 1912, the said Sam Vlik & Company, with intent to hinder, delay, and defraud their creditors, and particularly the said Paul Ringseth and the said Jack McLean, the plaintiffs in the actions hereinbefore alleged, made and executed a certain conveyance or



bill of sale, wherein and whereby they attempted to grant, bargain, sell, and convey unto the plaintiff herein, 210 cords of four-foot birch wood, situate on Discovery Claim, Chatanika Flats, for the fictitious consideration of two thousand dollars, with the design thereby to defraud of their lawful debts and demands the said Paul Ringseth and the said Jack McLean, as well as sundry other creditors of said Sam Vlik & Company, and other persons to whom they were indebted.

(d) That, as this defendant is informed and believes and so alleges, the 163 cords of wood so sold by this defendant, in the manner aforesaid, was part and parcel of the wood mentioned and described in said conveyance and bill of sale, and said wood was, at the time of said pretended conveyance and bill of sale, in the possession of and owned by said Sam Vlik & Company.

(e) That, as defendant is informed and believes and so alleges, the consideration of two thousand dollars named in said conveyance and bill of sale was fictitious, and the said plaintiff did not, at the time of the execution of said pretended conveyance and bill of sale, pay to the said Sam Vlik & Company the sum of two thousand dollars, lawful money of the United States of America, or any other sum or sums of money whatsoever, and the said pretended conveyance and bill of sale so made and executed was wholly without consideration, and was made and executed by said Sam Vlik & Company to said plaintiff, and was accepted by said plaintiff, for the

sole purpose and design of hindering, delaying, and defrauding the creditors of the said Sam Vlik & Company hereinabove mentioned, of their lawful suits, damages, debts, and demands.

(f) That, as defendant is informed and believes and so alleges, at the time of the making of said alleged bill of sale and conveyance, as aforesaid, the plaintiff did not enter into the possession of the said wood or any part thereof, nor has he, at any time since he sold and delivered the wood hereinbefore mentioned to said Sam Vlik & Company, been in the possession, actual or otherwise, of the said wood or any part or portion thereof.

(g) That, as defendant is informed and believes and so alleges, during all the times mentioned in plaintiff's complaint and for a long time prior thereto, all the wood and other chattels seized by the defendant herein, under and by virtue of the process hereinabove alleged, was owned by and in the possession of the said copartnership of Sam Vlik & Company hereinbefore mentioned.

WHEREFORE, defendant prays hence to be dismissed with judgment in his favor for his costs.

McGOWAN & CLARK

Attorneys for Defendant.

(Duly Verified.)

Due service hereof admitted this 9 day Jan. 1913.

H. A. DAY,

Attorney for Plf.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div., Jan. 9, 1913. C. C. Page, Clerk.  
By P. R. Wagner, Deputy.



[Title of Court and Cause.]

**Third Amended Reply.**

Comes now the plaintiff and by leave of Court files this his third amended reply to defendants answer herein.

Referring to the first separate answer and defense of defendant's answer:

I.—Plaintiff denies the seizure set forth in paragraph D, except **as to the three cords of wood.**

II.—Plaintiff denies each and every allegation contained in paragraphs E. F. G. H and J.

As to defendant's second answer and defense:

III.—Referring to paragraph D. plaintiff denies each and every allegation therein, except as to issuance of attachment and seizure of three cords of wood.

IV.—Referring to paragraphs E. and F. in said second separate answer, plaintiff denies each and every allegation therein contained.

V.—Plaintiff denies each and every allegation contained in subdivisions G. H. I and J of said second affirmative defense, saving and excepting that plaintiff admits that the defendant in his capacity as United States Marshal did, under a pretended seizure under an alleged execution, on or about the 25th of June, 1912, sell certain wood, the same being a part of the wood described in plaintiff's complaint.

Referring to defendant's further, separate and third answer and defense to plaintiff's amended complaint herein, plaintiff says:

VI.—That he denies each and every allegation con-

tained in subdivision A of said third affirmative defense, and alleges that the number of cords of wood wrongfully sold by defendant is one hundred and ninety three cords.

Replying to the fourth separate answer and defense in said answer, plaintiff;

VII.—Referring to paragraphs C. E. F. and G plaintiff denies each and every allegation contained therein.

WHEREFORE plaintiff prays judgment as in said complaint prayed for.

H. A. DAY,

(Duly verified)

Attorneys for Plaintiff.

Service of the foregoing 3rd reply admitted and a true copy thereof received this 25th day of April, 1913.

McGOWAN & CLARK,

Attorney for Deft.

(Indorsed) Filed in the District Court, Territory of Alaska, 4th Div., Apr. 25, 1913. C. C. Page, Clerk.  
By P. R. Wagner, Deputy.

[Title of Court and Cause.]

### Notice.

Comes now the defendant, and, within the time allowed by law and the orders of this Court, presents his proposed bill of exceptions in the above entitled action for settlement and allowance, a copy of which is served herewith.

Fairbanks, Alaska, 16 October 1913.

McGOWAN & CLARK,

Attorneys for Defendant.



Due service hereof admitted this Oct. 16, 1913.

H. A. DAY, M. E. STEVENS,

Attorneys for Plff.

---

[Title of Court and Cause.]

**Defendant's Bill of Exceptions.**

Be it remembered that this case came on regularly for trial, on the 25th day of April 1913, before Honorable Frederic E. Fuller, Judge, sitting with a Jury duly impaneled and sworn to try the case, the plaintiff appearing in person and by his attorneys, Morton E. Stevens, esquire, and H. A. Day, esquire, and the defendant appearing by his attorneys, Messrs McGowan & Clark, whereupon the following proceedings were had and testimony was taken:

Mr Stevens made his opening statement in behalf of plaintiff;

Mr Clark made his opening statement in behalf of defendant.

At the request of the plaintiff, and both parties consenting, Tony Buttermich was sworn to interpret truly from the Slavonian language into the English language and from the English language into the Slavonian language.

VASO PAVLOVICH, the plaintiff, was called and sworn as a witness in behalf of plaintiff and testified through the interpreter in substance as follows:

**DIRECT EXAMINATION.**

It was admitted by both parties that the property in controversy, to wit, the wood described in

the plaintiff's complaint, was the property of Sam Vlik & Company on 17 May 1912, at the time the defendant claims it was first attached.

(The Witness): I am the plaintiff in this case. In May 1912 I lived on Little Eldorado and Olness. In May 1912 and for some time prior thereto I was a woodcutter and wood dealer, I was cutting wood.

It was here admitted that, in May 1912, the witness knew the firm known as Sam Vlik & Company, operators on Discovery claim on Chatanika Flats.

(Witness): Prior to the 17th day of May 1912, and on the 1st day of February 1912, I sold the wood that is in controversy in this case to Sam Vlik & Company; I sold them 252 cords at the price of \$4.00 per cord. At that time the wood was located above hill from where I was cutting; it was not located on Discovery Flats, Chatanika, at that time. This wood was all together in one pile and was situate about four miles from Discovery claim on Chatanika.

Q. (Mr. Stevens): What does he mean by "It was all together," that it was all together on Discovery claim on Chatanika, or all together in the woods, or scattered in the woods. Find that out.

A. It was scattered all around, two and three cords at a time in places.

Q. In the woods?

A. Yes sir.

Q. Now, he stated that he sold that wood to Sam Vlik & Co. in February. Did Sam Vlik & Co. pay you anything in February, or at any other time up to



the time you got this bill of sale?

A. None at all, sir.

Q. Ask him whether or not Sam Vlik & Co. gave him promissory notes, promising to pay for this wood.

A. Yes sir.

Q. Did you at any time prior to the 18th day of May 1912, furnish to Sam Vlik & Co. any horse feed?

Ex. 1. (Mr. McGowan): We object as irrelevant, immaterial, and incompetent, not bearing upon any issue in this case.

(Mr. Stevens). It shows the consideration for this transfer.

(Mr. McGowan): There is no transfer before the Court.

(Mr. Stevens): We expect to introduce the bill of sale from Sam Vlik & Co.

(The Court): Objection overruled, under your statement.

(Defendant excepts; exception allowed).

A. Yes, sir, he did.

Q. (Mr. Stevens): Get him state about the time, as near as he can.

A. He gave him about four tons about the 1st of February, and one ton about the 1st of March.

(Witness): I paid the freight on that five tons of horse feed, from Fairbanks to Chatanika; I paid \$80.00 for freight and \$362.75 to the N. C. Co. for the feed. When I got this freight to Chatanika I gave it to Sam Vlik and Sam Vlik gave it to a teamster to haul this same wood. I gave Sam Vlik \$110.00

to give to the teamster money to buy horse feed any place that he wanted. This was the same teamster that hauled this wood for Vlik & Co., that I sold to Vlik & Co.

Q. (Mr. Stevens): Ask him if Sam Vlik & Co. agreed to pay him back for this feed that he had furnished, and feed and money that he had paid.

Ex. 2. (Mr. McGowan): We object to that; it is hearsay, and Sam Vlik & Co. are the best witnesses to testify to that.

(The Court): Objection overruled.

(Defendant excepts; exception allowed.)

A. Yes sir, they did.

Q. (Mr. Stevens): Ask him now: Up to the time he took the bill of sale from Vlik & Co. on the 18th day of May, whether or not he ever got anything in the way of payment from Vlik & Co. for either this wood, or the supplies, or this money he paid.

A. Not one cent.

(Witness): Up to the time I took the bill of sale from Sam Vlik & Company, on the 18th day of May, I did not get anything in the way of payment from Vlik & Company, for either this wood or the supplies or this money I paid, not one cent. On the 18th day of May 1912 I was in Fairbanks, in company with Sam Vlik at the time Sam Vlik & Company made this bill of sale to me. I met Sam Vlik in Olness and he told me he could not pay me anything and he was willing to give me a bill of sale, and he came to Fairbanks with me. He and I went to the Commissioner's Court at Fairbanks, for the purpose of getting this



bill of sale made.

(Mr. Stevens produces bill of sale.)

(Witness): I remember this is the bill of sale that Sam Vlik gave me; it is the one that was made out by John Dillon, conveying 210 cords of wood, located on Discovery claim, from Vlik & Company to me; the consideration stated is \$2000.00, which was money that was owed me, \$2000.00 for wood, that Vlik & Company owed me. I recognize this as the bill of sale that I got.

(The bill of sale was here offered in evidence, read to the Jury, and received and marked "Plaintiffs Exhibit A", and is in the words and figures following:—)

#### PLAINTIFF'S EXHIBIT "A".

Know all men by these presents: That Sam Vlik and Co. a copartnership consisting of Sam Vlik, Dan Vlik, and Mike Onok, the party of the first part, for and in consideration of the sum of Two Thousand (\$2000.00 Dollars lawful of the United States of America, to it in hand paid by Vaso Pavlovich the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns two Hundred and ten cords of four foot birch wood, situate on Discovery claim on the Chatanika River between the mouths of Little Eldorado and Cleary Creeks, Fairbank Precinct Alaska To Have and to Hold the same to the said party of the second part, executors, administrators and assigns forever. And

it does for its heirs, executors and administrators, covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, it have hereunto set its hand and seal the 18 day of May in the year of our Lord one thousand nine hundred and twelve.

SAM VLIK & CO. (Seal)

By SAM VLIK (Seal)

One of the firm.

Signed, sealed and delivered in the presence of John F. Dillon, C. E. Wright.

United States of America, Territory of Alaska, ss.

This is to Certify That on this 18 day of May A. D. 1912 befoe me John F. Dillon a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came Sam Vlik, of the firm of Sam Vlik & Co to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned. for and on behalf of Sam Vlick and Co. Witness my hand and official seal, the day and year in this certificate first above written.

(Notarial Seal)

JOHN F. DILLON



Notary Public in and for the Territory of Alaska.

(Indorsed): Entered 36351 Indexed Compared Bill of Sale from Sam Vlik & Co to Vasco Pavlovich Dated May 18, 1912. United States of America, Territory of Alaska Fairbanks Precinct Filed for record at request of Sam Vlik on the 18 day of May 1912 at 40 Minutes past 10 A. M. and recorded in volume 2 of Nills of Sale, page 94. Records of Fairbanks Precinct Territory of Alaska John F. Dillon.

(Witness): At the same time this bill of sale was made out, on the same day, Mr John Dillon made out some notices for me. He made six and I put up only four.

Q. (Mr. Stevens): Ask him to look at that (producing paper) and see whether or not that is one of the notices that John Dillon made out and gave to him on the same day that he made out the bill of sale.

A. He say he can't read but it looked like that same one.

Q. Ask him if that looks like the same one that he gave to his lawyer, judge Day.

A. Yes sir.

Q. Ask him how many notices of that kind did he post on this wood that is in dispute in this case.

Ex. 3. (Mr. Clark): We object on the ground that it is not shown this is a copy of the notices posted on the wood. He says he can not read and doesn't know, but it looks like it. It is not binding on the defendant.

(The Court): Objection overruled.

(Defendant excepts; exception allowed).

A. Four.

(Witness): I divided these notices on four corners, put one copy up on each corner. I put them up on the 18th day of May, about 7 o'clock in the evening, on the same day that Mr Dillon made them out. Mr Dillon made these notices at 10 o'clock in the morning and I left at some time in the afternoon on the train, but don't remember the hour. At 7 o'clock in the evening of May 18th when I posted these notices on this wood it was the same wood that I had already sold to Sam Vlik & Co. in February before.

(Mr. McGowan): We admit that the wood was on the claim that day, piled up there.

(Witness): This wood was all piled together, with the exception of 2 cords that they were using on the claim, and that was about 20 feet distant from the wood that they were using for that purpose. This wood that I put the notices on was piled in nine tiers or ricks running right along together. The tiers were from 8 to 10 or 12 feet and 9 from the ground, but not less than 8 feet. There was only one tier that was a little bit shorter than the others, but the teamster put them together the same. Eight of these tiers were the same length and the other one a little shorter than the others in length. They measured this wood inside of two days and there was 193 cords. I used a stick, 8 feet long, as a method of measurement. I measured the stick with a rule to find whether it was 8 feet long. When I measured the wood there were three men with me to help me;



one fellow named T. Thomas, another is Peter Marcovich, but he has gone to the old country, to Albania, and I think M. Surack was there when it was measured. There was three and myself, making four. They are all here now, excepting Pete, who went to the old country. The wood was measured about the 20th of May and the measurement was 193 cords. The value of this wood to sell, that is the market value in May 18 or 20, 1912, located where it was located, was \$12.00 a cord. It was birch and spruce wood, in 4 feet lengths and anything that was over 5 inches was all split. It was all ready to be used in the boiler for mining purposes. In addition to the 193 cords mentioned there was a small pile of two or three cords at one side; this was dry spruce; I didn't measure it exactly, but just from sizing it up. There was 15 or 16 or 17 ft. long in that small pile of spruce, and it is ordinarily referred to as 16 ft. wood. This wood was between 20 and 30 feet from the boiler house on the claim. I am just guessing at this. This wood was located close to the shaft, between the boiler house and the big pile of wood. On the 18th day of May 1912, when I went there and posted the 4 notices that John Dillon made out for me, there were 3 persons besides myself on the ground; there were Nick Sventovich, Ole Richards, and Theodore Thomas. Mr. Ringseth was not there, I didn't see him at all. Mr. Love, the marshal, was not there. There was no deputy marshal there; none at all. Mr. Lysle Brown, a deputy marshal, was not around there anywhere, I did not see anybody.

On the 18th day of May 1912, in the evening, when I posted these four notices on the corners of this big pile, there were no other notices posted on the wood besides the one I posted, none at all. I was present at the place where this wood was located on Discovery claim, Chatanika Flats, at the time Mr Carlson, the deputy marshal, made the sale. I was there when he sold the wood but I didn't know his name. It was this man here (pointing at M. O. Carlson, deputy marshal).

(It was here admitted that Mr Carlson was at that time a duly appointed and acting deputy marshal and made this sale under execution.)

(Witness): At the time the deputy marshal was about to make the sale of this wood, I went and got two men, —took them from their bobs, —took them with me, —took one man from his job and paid him wages, to explain to Mr Carlson, deputy marshal, that the wood belonged to me, because I could not talk English with him and he could not understand me. I hired two men, one I paid wages and the other I didn't pay nothing to. These two men were there at the time the sale was made; one of them was hired and the other was one of my partners. Peter Radovich was the one that interpreted for me to the marshal when I notified the marshal that it was my wood and not to sell it. I told Peter Radovich what to say to the marshal at the sale. I told him to tell Mr Carlson that the wood belonged to me; that if he sold it he has got to give me that money.

Q. Did Mr. Radovich, so far as he knows, speak to



the marshal and interpret it into English?

A. He say he did talk to him. He told him and he did talk and when he talked something he didn't know exactly—hear the word what what he said.

Q. There were two sales, as I understand. Was that at the first sale or the second sale; or does he know? Did he attend two sales, or one?

A. He says the first sale, and the second one he was not there at all.

Q. This was the first sale?

A. Yes, the first.

(Witness): This was on the 6th day of June. I don't know how much the marshal sold that wood for, nor how much the marshal got for it a cord. The marshal, the defendant in this case, never paid me for that wood that he took away from me and sold; I didn't get a cent.

(Counsel for plaintiff here offered in evidence one of the notices that Mr Dillon prepared and that plaintiff testified he posted on the wood, counsel stating that the plaintiff could not write and that the paper wasn't signed by him personally, but by his authority. Which paper was read to the jury and marked in evidence as "Plaintiffs Exhibit B", and is in the words and figures following:)

#### PLAINTIFFS EXHIBIT B.

"To all to whom it may concern: Notice is hereby given that I, the undersigned, am the owner of all the wood contained in this pile. And all persons are hereby warned not to take away or remove the same,

or any part thereof, from these premises, or to in any way interfere therewith. Dated this 18th day of May, A. D. 1912.

VASO PAVLOVICH, Owner."

(Witness): Sam Vlik wrote my name on that notice: I didn't know how to write and I asked him to sign my name for me. I don't write the English language.

### CROSS EXAMINATION.

Q. (Mr. McGowan): What time did you meet Sam Vlik on the morning of the 18th?

A. He say he met him at Olness.

Q. What time in the morning?

A. He said he met him in daytime. He met him at night. He came at 11 o'clock at night in Barney Sandstrom's bunkhouse.

Q. That is Sam Vlik?

A. Yes.

Q. What did Sam Vlik tell him to do? Did he tell him to come to town with him?

A. He said he had no money to pay him for wood and he wanted to give him a bill of sale of wood.

(Witness): He didn't tell me at that time that an attachment had been put on his place, on the boiler house and on the wood. Nothing was said about the marshal or the commissioner out there having placed an attachment on the place or a suit being commenced. Nobody told me that at all. When I came to town with Sam Vlik I didn't know that this attachment had been put on. I came in from Olness with Sam Vlik on the train that leaves out there in



the morning. I don't recollect what time it was. When I came to Fairbanks Sam Vlik and myself went right to the commissioner's office. We didn't stop to have anything to eat or anything like that; went straight to the commissioner's office, and this paper, Plaintiff's Exhibit "A", was made out by Mr Dillon at that time.

Q. This paper says \$2,000.00 was paid by you; did you pay anything like that?

A. He said that he owed him \$2000.00.

Q. And that was all there was to it, the \$2000.00 he owed him.

A. He say he owed him \$1565.00 and 13 shifts for wages that he earned.

Q. That included wood and feed and wages. Is that right?

(Mr. Stevens): And freight.

(Mr. McGowan): And freight?

A. Yes sir.

Q. \$1720.00?

A. Yes sir.

Q. Why didn't you put \$1720.00 in this paper?

A. He says he didn't know that. He just put what he owed him. That is what he thought the wood was worth, \$2,000.00.

Q. So that 210 cords of wood on the 18th day of May 1912, out on this same creek, was worth \$2000.00, and that is why he put it in. Is that right?

A. He says it did if it was 210 cords, but he didn't measure it yet, on that account.

Q. But 210 cords on the 18th of May was worth

\$2000.00 he thought? That is what I want to get at.

A. Yes sir.

Q. You testified a few minutes ago that the value of wood was \$12.00 per cord on the 24th of May. I want to know, if 210 cords is only worth \$2000.00, how did the price of wood increase so rapidly between the 18th and the 24th, or the value of the wood?

A. He says it was a high market for wood at that time.

Q. Was the wood higher on the 24th of May than it was on the 18th of May?

A. He says it was about the same price. The only thing, it is hard to bring it in that time, to land it there on the claim.

Q. You were talking about the same wood, were you not? The wood in this bill of sale and the wood that was sold was the same wood, was it not?

A. Yes sir, the same wood.

(Witness): I didn't see Pete Vidovich on the 18th of May when I came town. I had no interpreter except Sam Vlik; he acted as interpreter and explained this paper, Plaintiffs Exhibit A, and at the same time I told him to sign my name to Plaintiff's Exhibit B. On the morning of 18 May, when these papers were made out and signed Sam Vlik didn't give me any money or anything, only a bill of sale, that bill of sale, Plaintiff's Exhibit A.

Q. Did Sam Vlik tell you the night befoe that he was broke and the plant was going to close up?

A. No sir, he didn't tell me anything at all.



Q. Why was it that you came in on the morning of the 18th and got this bill of sale and then got these notices made out, Plaintiff's Exhibit B, and ran right back and posted them on this wood that night, if you didn't know anything about these difficulties?

(Mr. Stevens): Seven o'clock is not night on the 18th of May.

(Mr. McGowan): In the evening, then.

A. He says he told him he would give the wood back as he can't work there any more. He can't give him no money, so he would give him a bill of sale of the wood.

Q. Sam Vlik did tell you that he was not going to work there any more, did he?

A. Sam Vlik don't know for sure whether he would work or not, but he was going to give him the wood back.

Q. Did Sam Vlik tell him anything about stopping work or that he was not going to work any more? That is what I want to get at. Or that he was going to close down?

A. He said Sam Vlik told him that he don't think he will be able to go ahead and will give him a bill of sale to that wood.

Q. Then Sam Vlik told him about the trouble, before he came into town.

A. No sir.

Q. He did not. Where did you meet Sam the morning that you came in on the train? When did you meet him that morning before you got on board

the train?

A. He said he met him at Olness and he told him: "Things don't look very prosperous" and he thinks he is going to close, and he can't pay him anything, so he will give him a bill of sale of the wood back.

Q. At that same time did Sam bring the last cleanup in with you at the time he came in—the cleanup of gold that he took away from there?

A. He said he didn't tell him anything and he didn't know if he had anything or not.

Q. Mr Vlik didn't go back any more to Chatanika or Olness, did he?

A. He say he went back but he didn't know what he was going to do.

Q. Did he go back with you that night on the train?

A. He say he did go on the train with him, but he didn't know where he was going to, Little Eldorado, Chatanika, or where.

Q. When you got off the train at Chatanika, was he on the train with you; was he there with you?

A. No sir.

Q. Who paid downstairs in the commissioner's office for these papers, Plaintiff's Exhibits A. and B., Sam Vlik or you?

A. He say he paid to fix the papers, Sam Vlik.

Q. Sam Vlik paid for making out this bill of sale and this other notice?

A. Yes sir.

Q. Did he give you any other money or gold dust or anything else, at that time or any other time be-



tween the 17th and 18th?

A. Not one cent, none at all.

Q. Did you on that morning, the morning of the 18th, promise Sam Vlik when he gave you this bill of sale, Exhibit A, that you would go back to the creek and put the notices up and sell this wood, and when you sold it you would keep \$1720.00 and give the rest to Sam?

A. If I sell it for any more I would.

Q. You told Sam Vlik when he gave you this bill of sale on that morning that, if you got more than \$1720.00, you would give the rest of the money to Sam?

A. He said he did, because he don't think that was his.

Q. You didn't think the rest would belong to you. That is right?

A. Yes, if he sold it for more.

(Witness): I measured this wood inside of two days after I got back, with three men, they helped me. Mike, that was measuring with me, put the figures on a piece of paper, altogether they were figuring it. I couldn't do any figuring myself. All four were figuring and Mike said it figured out 193 cords. This wood was originally sold to Sam Vlik & Co. for \$4.00 a cord. It was cut in 4 ft. lengths in the woods ready for use in the boiler. It cost \$6.00 a cord to haul it from the hills to Sam Vlik & Co.'s claim. All of that wood was piled in one big pile; several ricks or stacks and all in one big pile together on Sam Vlik's claim when it was hauled in, altogether on

the claim. At one side near the boiler house there was another small pile of 16 ft wood, about 3 cords; it was sawed for the cook house and some for lagging too.

Q. Did you ask them at the same time to look around and see if there was anybody there, anybody else, so as to be sure there was nobody there, or anything like that?

A. He say he went with them and seen himself.

Q. But did you ask them to look around and see if the marshal was there, or anybody from the commissioner's court; to look over the plant, and see if anybody was there?

A. He says he went with them and seen himself.

Q. Did you go up to the boiler house and the mess house and see if the marshal was there at that time?

A. He says he was in the boiler house but not in the mess house.

Q. You don't know whether there was anybody on the ground at that time or not from the marshal's office, do you?

A. He say he was looking over the wood himself to see if there was any notices; then he called for the three men and put up those notices he got from commissioner Dillon.

Q. You told Mr. Stevens a few minutes ago that on the 18th there were no notices on the claim except the ones that you put up. is that right?

A. On the 18th?

Q. Yes, on the 18th, when he got back there that night.



A. No sir, he did not.

Q. And you looked all over the claim, did you, to see if you could see anybody or any papers?

A. No.

(The Court): Read that question. (Question read: "And you looked all over the claim, did you, to see if you could see anybody or any papers?")

A. Yes sir.

Q. (Mr. McGowan): Did you see the gin pole near the boiler house, or the telephone pole, or either one of them.

A. He did.

Q. Did you see any paper on either of those poles, the telephone pole or the gin pole?

A. He did not.

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MIKE ONAK, sworn as a witness for plaintiff, testified through the interpreter substantially as follows:

DIRECT EXAMINATION.

(By Mr Stevens).

(Witness): My name is Mike Onak; I was a member of the partnership or firm of Sam Vlik & Company.

(It was here admitted that, prior to the month of May and some time in the spring or winter of 1912 the firm of Vlik & Co. purchased some wood from the plaintiff.)

(Witness): We bought from the plaintiff in the winter of 1912 255 cords of wood at the price of \$4.00 per cord, that would be \$1008.00. Sam Vlik & Co.

did not, prior to the time of their giving the plaintiff this bill of sale, ever pay the plaintiff for this wood, they paid nothing at all. The plaintiff furnished Sam Vlik & Co., my firm, with some horse feed from Fairbanks, for the purpose of enabling their teamster to haul this wood from the woods down to Discovery claim on Chatanika. I don't know how much it was worth, how much it cost, or how much the plaintiff got credit for, but it was four tons. I know that the plaintiff did pay \$80.00 for freight and that feed.

Q. Does he know anything about the plaintiff buying any feed from the defendant Ringseth in Chatanikt that went for the same purpose, to the wood hauler for his team?

A. He said he bought, but Sam Vlik—the plaintiff gave him one hundred and ten dollars to buy feed.

Q. Did the plaintiff work for Sam Vlik & Co. prior to May 1912?

A. Yes sir, he did.

Q. Does he know how much Sam Vlik & Co. owed to plaintiff about the time this bill of sale was given on the 18th day of May 1912?

A. He says over \$1500.00 to \$2000.00, something.

Q. You mean between fifteen hundred and two thousand dollars?

A. Yes, it was fifteen hundred to two thousand dollars.

(Witness): That bill of sale was given to pay for wood and horse feed that he—it was given in payment of the debt that Sam Vlik & Co. owed to the



plaintiff, for what he was owing.

### CROSS EXAMINATION.

(By Mr McGowan).

(Witness): I was not present when Sam Vlik gave Pavlovich the bill of sale for the wood. I first heard about the bill of sale on the 18th of May in the night when the plaintiff came back to the creek. Sam Vlik was my partner out there. Sam Vlik told me on the night before, on the 17th, he was going to town to give Pavlovich a bill of sale of the wood. Sam Vlik told me that Pavlovich stopped working for me and Sam Vlik in the neighborhood of the 10th of May.

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CHRIS SPISCH, a witness called in behalf of plaintiff, being sworn, testified through the interpreter substantially as follows:

### DIRECT EXAMINATION.

(By Mr Stevens).

(Witness): I was present at the marshal's sale of the wood in question on Discovery claim on Chatanika on 6 June 1912. I heard the plaintiff state to Peter Radovich that Peter Radovich should notify the marshal that that wood belonged to the plaintiff.

(It was here admitted that Peter Radovich spoke to the marshal at that time. The interpreter was then excused.)

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T. THOMAS, a witness called in behalf of plaintiff, being sworn, testified substantially as follows:

## DIRECT EXAMINATION.

(By Mr Stevens).

(Witness): I was present on Discovery claim, Chatanika Flats, down at Sam Vlik & Company's place, about May 20th or 21st, when the plaintiff in this case measured the wood. I helped to measure the wood. We measured one row by one stick, eight feet long, and the height to the top how many feet it was, and it was nine strings—9 rows, or 9 ricks, or 9 strings of wood. They were the same length—one was a little short—the closest to the boiler house. Eight of those strings were the same length and the ninth was a little short. One Montenegro fellow there, Pete Marcovich, helped me to measure the wood there. He has gone to the old country to go to school. And Mike, one Austrian fellow, I don't know his second name, and Vaso Pavlovich. We were four that time. We found 193 cords of 4 ft. wood, birch. We figured up some places 8 ft. high, some places 9, 10, and 11 ft., we figured up 193 cords, that is what it amounted to.

Q. Did you see at that time any notice posted up there that had Pavlovich's name, the plaintiff's, signed to it, where he claimed the wood as his?

A. No sir.

Q. Did you see any notices there that that was Pavlovich's wood?

A. That wood?

Q. Yes.

A. Yes sir, I saw at the four corners that Vaso Pavlovich notice about that wood.



Q. On the four corners.

A. Yes, on the four corners.

Q. You say that was about the 20th or 21st?

A. 20th or 21st of the same May.

#### CROSS EXAMINATION.

(By Mr McGowan).

(Witness): We figured how many cords we got and we write; we took our figures and wrote our figures. Mike figured it; I didn't figure it; I measured; I was there at that time; I measured and hollered to Mike "80 feet" and he put her on the paper; then he figured it up. Mike is here.

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M. SURACK, a witness called for the plaintiff,  
being sworn, testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr Stevens).

(Witness): I was present on Discovery claim on Chatanika Flats on the 20th or 21st of May 1912, when the plaintiff in this case and several others measured the wood there in those nine ricks, the wood in dispute in this case. I helped to measure that wood. We used an 8 ft. pole. I made the pole myself. That wood was piled together in 9 rows together. Eight of them were of the same length and one was shorter. In some places it was 10 or 11 ft. high and in some places 8. It averaged between 8 and 10 ft. The majority of the wood was spruce and there was some of it birch, but I can't tell for sure what kind of wood it was; I didn't pay any particular attention to what kind of wood it was. The wood

was split. It was in 4 ft. lengths, ready for use in the boiler. There was 193 cords of wood. There was also a little small pile of wood; it was about 50 or 60 ft. from the big pile, close to the boiler house, toward the boiler house, but I can't remember how big that was. In that little pile there was some 16 ft wood and there was a little pile of 4 ft. wood, but that little pile of 4 ft wood was at the door of the boiler, and that long wood, 16 ft. wood, I think it was about 20 or 30 feet from the boiler. I have measured wood before I measured this wood. I understand measuring pretty well. I have had experience from 16 years of age up to now. I measured that wood according to the way I always measure wood and I found 193 cords.

#### CROSS EXAMINATION.

(By Mr. McGowan).

(Witness): I put the figures down in a book or on paper. I have not got it with me. I didn't measure it all separately myself; I just watched them gentlemen. I was on the top, then I went up the side and down with them other men and I marked their measurements; I kept the figures and figured it out and it was 193 cords. I didn't tell the other men how many cords there was. We put him on a paper how many cords it was—put that down—and afterwards we figured out together. I didn't figure that out all by myself. Them fellows figured it too and I watched them and I figured for myself also.

Q. And the plaintiff Pavlovich, did he figure too?

A. He say how much it was.



Q. Did Pavlovich figure?

A. He figured out without pencil, without paper. He know just how many cords there was before I put it on a paper.

Q. Had he any paper?

A. No, but he knew.

Q. You didn't tell him how many cords?

A. No, but I figure it out with a pencil.

Q. What did you do with that paper? Did you give it to Pavlovich?

A. Yes, I gave it to him.

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NICK SIVIDIVICH, a witness called in behalf of plaintiff, being sworn, testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr Stevens).

(The Witness): I am acquainted with Vaso Pavlovich, the plaintiff in this case. I was on Discovery claim on Chatanika Flats on or about the 18th day of May last 1912. I was there, that is the day I passed by there. I was looking for a lay myself and seen that claim. I posted some notices on a big wood pile that was there. It was a great big pile but I never counted it, that is, I never measured it. I posted four notices there. One on each corner. It was after six o'clock; we had supper there. We were working for wages and then I post up. I don't know exactly what time it was but it was in the evening. Mr Pavlovich's name was signed to these notices, and if I see the notice I can read it and tell you.

(Counsel here handed to witness Plaintiff's Exhibit B, and after the witness had examined the same, he further testified as follows:)

That is a copy of the notice that was posted on the four corners of that big wood pile; the notices posted were the same as that. I did that at the request of Mr Pavlovich.

#### CROSS EXAMINATION.

(By Mr McGowan).

(Witness): I didn't stay on the claim with Pavlovich after that; I was working for Charlie Rosin. I didn't come away with Pavlovich. I went to Chatanika town. I gues Pavlovich came back to Chatanika after a while, I didn't watch him; I saw him in Chatanika that same day.

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PETER RADOVICH, witness called in behalf of the plaintiff, being sworn, testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr Stevens).

(Witness): I just know Vaso Pavlovich, the plaintiff in this action, I know him when I se him. I was present on the 6th day of June 1912, at Discovery Claim on Chatanika Flats, in Fairbanks Precinct, at the time the United States marshal, or the deputy here, Mr. Carlson, sold the wood that is in dispute in this case or part of it. I asked the deputy marshal at Chatanika just befoe the sale took place if he was going to sell the wood at 2 o'clock, and he said "Yes," he was going to sell the wood at two



o'clock. Then I went down where the wood was. Then Mr Pavlovich told me what I was going to say to the marshal. Mr Pavlovich says: That is my wood; anybody wants to buy that wood got to pay Mr Pavlovich. I explained that to Mr Marshal. The marshal says: I have got orders to sell that wood. Mr Pavlovich says "that is his wood, he can't lose his money, somebody put up bonds for me." The marshal told him he could not lose his money if he owned it, because the marshal had a bond to secure him, at the courthouse. Then the marshal went ahead and sold it. I guess the marshal got \$8.75 a cord for the wood. I don't know exactly how much wood he sold. I didn't pay no attention. I was sitting there. Pavlovich, the plaintiff, was there at the time of the sale. He told me what to tell the marshal and I translated from the Slavonian into English. I told the marshal just exactly in the English language what Pavlovich told me.

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DAN VLIK, a witness called in behalf of the plaintiff, being sworn, testified substantially as follows:

DIRECT EXAMINATION.

(By Mr Stevens):

(The Witness): My name is Dan Vlik, I am one of the members of the firm of Sam Vlik and Company. Sam Vlik is just like a cousin to me but not quite cousin. Sam Vlik is in the old country. There was Sam Vlik and myself and Mike Onak, three of us, in this firm. I know the plaintiff. Sam Vlik &

Co. bought a lot of wood from the plaintiff in the winter of 1912. It was about 250 cords, and was located in the woods at the time Sam Vlik & Co. bought it. We bought it for \$4.00 a cord in the woods, that would be \$1008.00. Pavlovich furnished some feed to Sam Vlik, for the purpose of feeding the horses of the plaintiff. He bought from the Northern Commercial Company, but I don't know how much that was and he paid the freight and he used some cash to buy feed over in Chatanika. The plaintiff worked for our people, Sam Vlik & Co.. Sam Vlik & Co. didn't pay the plaintiff anything for any of the wood or feed or freight or for labor. On the 18th of May, when this bill of sale was given, Sam Vlik & Co. owed the plaintiff Pavlovich for all these matters that I speak of. We owed him in the neighborhood of \$1700.00 and something \$1720.00, something of that kind, that is just about right. I was not present at the time the bill of sale was given. I didn't know anything about it, excepting what has been told me. Sam Vlik was the manager of the partnership and run the business and had authority to give this bill of sale.

#### CROSS EXAMINATION.

(By Mr McGowan)

(Witness): I first heard about this bill of sale, plaintiff's exhibit "A", when I see it when Pavlovich came home and Sam told me so too. That was on the 18th all right. Sam didn't speak to me the night before he went away about giving this bill of sale to Pavlovich. When he came back he told me he



gave the bill of sale to Pavlovich. I was down in the hole when Sam left the claim and he left the claim something about 4 o'clock on the 17th. Pavlovich was living at Olness at that time and Sam must have gone to Olness to see Pavlovich. The first I heard of the bill of sale was the next day.

Q. Did Pavlovich show it to you?

A. I see the attachment and he told me.

Q. You saw the attachment?

A. Yes.

Q. Did you see the attachment before you saw this bill of sale?

A. Well, I see something the same time.

Q. The same time.

A. Something when they came back.

Q. Did the marshal serve you with any papers that night, the night of the 17th?

A. Yes sir.

Q. What time?

A. In the evening some time.

Q. Pretty near twelve o'clock, wasn't it?

A. Some time in the evening.

Q. The marshal came on the claim on the night of the 17th and served you with two papers.

A. Yes, he did.

Q. Also two summonses and two attachments. Is that right?

A. Well, I couldn't understand much meaning of them papers, but I know he did give me all right, and I know he put one on the gallows frame, and I understand he attached a dump or something like that.

Q. Did you see one at the end of the wood pile?

A. No.

Q. You didn't see one there?

A. No.

Q. Where were you when he served you with the papers?

A. I was in the cabin.

Q. Did you say about the same time that night you saw this bill of sale?

A. I don't know when I seen that bill of sale.

Q. Then you didn't see this bill of sale the next night?

A. I don't know when it was I seen it; I dont remember that.

Q. When Pavlovich came back on the night of the 18th and put a notice on the wood, did you see him then?

A. Yes.

Q. Were you on the claim then?

A. Yes.

Q. Never moved off?

A. Not that time, I moved the next day.

Q. Did Pavlovich stay there on the night of the 18th?

A. Did he stay there?

Q. Stay on the claim?

A. I can't remember that.

Q. Did you sleep in the bunkhouse that night?

A. Yes.

Q. Did Pavlovich sleep in the bunkhouse?

A. No, I slept in my cabin.



Q. Were you in the bunkhouse that night?

A. Who? Pavlovich?

Q. No, you.

A. In the bunkhouse?

Q. Yes.

A. No, I don't know whether I was or not. I don't know when I saw him.

Q. Didn't you testify a while ago that Pavlovich showed you this bill of sale, Exhibit A? on the night that he came back?

A. Not that time.

Q. When did he show it to you?

A. Some other time, I don't remember when it was.

Q. How long afterwards?

A. It may be a few months or days.

Q. It may be a few months or days?

A. I didn't keep track of that.

Q. When did you first hear that Pavlovich owned this wood?

A. When he came back—(interrupted)

Q. What did he show you—(interrupted)

A. On the 18th.

Q. —when he came back?

A. He showed me that attachment.

Q. Pavlovich brought you back the attachment?

A. Yes, he put it on the wood and I saw it.

Q. Then Pavlovich put on an attachment?

A. I saw him put them notices on the wood.

Q. Were you with him?

A. Yes, I was around there.

Q. Before that had you got the attachment papers?

A. Yes, I had something but I didn't know what it was.

Q. You had got some papers?

A. Yes.

Q. When Pavlovich came back and put the notices on the wood did you speak to him or did you talk to him?

A. Pavlovich?

Q. Yes.

A. Well, may be we were speaking something, but I don't remember.

Q. Did you tell him about the attachment?

A. Yes.

Q. Did he know how many attachments there were, one or two?

A. I don't know if he knowed or not.

Q. Do you remember him speaking about Ringseth; that Ringseth, the store man down there, had attached?

A. No.

Q. Mr Ringseth had attached, you knew that?

A. He gave me some papers, but I didn't know what it was.

Q. How long did Pavlovich stay with you on that night of the 18th?

A. I don't know.

Q. Was he there an hour?

A. Well, I don't remember that, if he was five minutes or two hours, I don't remember.

Q. Did he go with you back to your cabin, or to the bunkhouse, or did he go down the creek?



A. No. I went to sleep right away in the evening.

Q. Right away when you saw him?

A. Not when I saw him. I went to sleep and the marshal came around and I was in the bed.

Q. You were in the bed when the marshal came around?

A. That was on the 17th.

Q. The marshal came on the 17th and you were in bed on the 17th?

A. Yes.

Q. Pavlovich had not come that night?

A. No.

Q. That was the next night?

A. Yes.

Q. Did you go to sleep the next night right after you saw Pavlovich?

A. I don't remember nothing about that.

Q. Did Pavlovich tell you to get off the claim; that he was going to hold this wood himself, and going to sleep there, or anything of that kind?

A. No, he didn't told me to get off the wood, but he told me he attached the wood.

Q. Then he went away from the claim, didn't he?

A. I don't know.

Q. You don't know?

A. Maybe he did.

Q. Did you see him there the next morning?

A. I don't remember if I see him.

Q. How many men were these those two days?

A. On the claim?

Q. Yes, in your crew, and everybody else put to-

gether.

A. I was there and my partner—(interrupted)

Q. Onak? That is all?

A. Maybe Sam was in the bunkhouse. I was in my cabin, and there was nobody else.

Q. That was all the men that were on the claim that night of the 18th?

A. Yes.

Q. That is all?

A. That is all.

Q. You don't remember seeing anybody else then?

A. No, I don't know.

Q. You are sure Pavlovich came there the night of the 18th about five minutes, but you forget everything else?

A. I know he put notices on. I just saw him and talked to him a few words, and I didn't bother him much.

Q. You would know if he went to your bunkhouse, or a cabin, or to your personal cabin, and stayed there?

A. No.

Q. Wouldn't you know about that?

A. He didn't stay.

Q. He must have gone back to Olness?

A. I don't know.

Q. He didn't stay there that night; you know that?

A. He didn't stay there that I know of.

Q. When did you next see him on that claim?

A. On the 20th or 21st of May.

Q. What did he do at that time?



A. I se them measure the wood, that is all.

Q. Then they went away again?

A. I guess they did.

Q. And the next time you saw them there was on the 6th of June at the sale, wasn't it?

A. I guess so, some time.

Q. How long did you and your partners live on the claim after the attachment was put on?

A. I didn't live long, I went hunting for a job.

Q. Were you there three or four days?

A. I was there one and a half days.

Q. How long did your partner Onak stay there?

A. He was there quite a while, he was sick.

Q. Did he stay right there on the claim for quite a while?

A. Yes sir.

Q. Until pretty near the time of the Marshal's sale. Is that right?

A. I don't know how long he stayed; he stayed and I went to work.

Q. Were you back there at the time of the marshal's sale on June 6th?

A. I don't think I did.

Q. Everything on the claim was attached, you knew that. The boiler and the wood, and everything else, on the night of the 17th?

A. On the night of the 17th?

A. Yes. You know that. The marshal told you, didn't he?

A. Well, I don't know if there was wood attached. He says there was the bottom of the dump attached,

and some other things—boxes.

Q. He left you a paper, didn't he?

A. He left me a paper.

Q. Where is that paper?

A. I don't know; I went away, I didn't took the paper.

Q. Can you read?

A. No, very little.

Q. Did you have anybody else read that paper for you?

A. Well I had a man just as much understand as me to read them for me.

(Witness): We closed down mining operations on the 17th. Sam Vlik went away, I don't know where he went. There was a cleanup made on that same day. Sam Vlik & Co. never opened up again on that mining plant after the 17th. Sam Vlik is in the old country now.

#### REDIRECT EXAMINATION.

Q. (Mr. Stevens) Mr. McGowan was asking you something about the attachment. You don't know what an attachment paper is do you.

A. Yes, I know.

Q. What?

A. Yes, I guess I know.

Q. What is an attachment?

A. To put something on the wood; when I see the papers on the boiler house or something like that I know that is an attachment.

Q. You said that the plaintiff in this case attached that wood. What did you mean by that?



A. I don't say he attached the wood.

Q. You did say it. But you didn't mean that, is that it? You said Pavlovich attached the wood.

A. Yes.

Q. Did he?

A. Yes, he attached the wood.

Q. How did he attach it?

A. He put four notices on the wood, on the piles.

Q. As a matter of fact he put a notice on the wood there that he owned the wood.

A. Yes.

Q. That is not an attachment. You don't know what an attachment is, do you.

A. I guess that is an attachment, I don't know.

Q. Mr Pavlovich never brought a suit against you to attach that wood.

A. Well, no.

Q. He went down and got a bill of sale to it, and put up a notice that he owned it.

A. Yes.

(The plaintiff here closed his case and rested.)

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### MOTION FOR NON-SUIT AND DIRECTED VERDICT.

(Mr Clark): At this time we move the Court to direct the jury in this case to bring in a verdict for the defendant; first, for the reason that the plaintiff in this case has failed to prove his case, in that he has not proven that the plaintiff in this case had any title to the wood in question upon the date the suit was instituted, or at the time the attachment was

levied, or at the time the property was sold under execution, as has been testified to; second, on the ground that it clearly appears that this transfer of the 18th of May 1912, from Sam Vlik & Co. to the plaintiff in this case, was done for the purpose of giving him a preference, and to hinder, delay, and defraud the creditors of the **defendant**; third, that it conclusively appears that the transfer was not a bill of sale transferring the title to the property, but was merely a mortgage given for the purpose of securing the indebtedness due from Sam Vlik & Co. to the plaintiff in this case, and that the plaintiff in this case was to hold the property until such time as he could sell it and get his money out, and turn the balance of it over to Sam Vlik. Further, it appears conclusively from the testimony that has been introduced on behalf of the plaintiff that the plaintiff never took such possession of the property as might validate a mortgage of that character, that is, in order to have a valid chattel mortgage, where there is no affidavit of merits and where it is not executed with the formalities prescribed by law, immediate possession must be taken and the possession must have been continuous thereafter, and that not such a possession was taken by the plaintiff in this case as would justify this Court in holding that that was a valid chattel mortgage, as it was undoubtedly intended from the conditions under which it was turned over. Further, that he was not in a position to take possession of the property, as it was then, and admittedly had been, attached by the marshal in the suit of



Paul Ringseth, the real party defendant in this case, against Sam Vlik & Co.

(The motion was thereupon argued by counsel for the respective parties and submitted to the Court for decision.)

(The Court) The motion will be denied.

(Mr Clark) We save an exception.

Ex. 4. (The Court) Exception allowed.

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LYSLE D. BROWN, a witness called in behalf of the defendant, being sworn, testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr McGowan).

(Witness): On the 17th and 18th days of May 1912 I was a deputy United States marshal in the Fourth Judicial Division of the Territory of Alaska and was on Chatanika Creek, at Chatanika city, on those days.

(Mr. McGowan): I have here the record from the commissioner's Court in Ringseth vs. Sam Vlik, which is certified on the 9th day of December 1912, by Mr Weiss, the commissioner, and at this time I offer in evidence the writ of attachment, together with the return thereto. I am not offering the entire record. I will offer the papers in sequence, in order.

(The writ of attachment was thereupon offered and received in evidence and marked Defendant's Exhibit 1, and is in the words and figures following, to wit:)

DEFENDANT'S EXHIBIT "1".

In the Commissioner's Court, Chatanika, For Fairbanks Precinct, Fourth Division, Territory of Alaska.

Paul Ringseth, plaintiff, vs. Sam Velik & Co., Defendant. No... Writ of Attachment.

The President of the United States of America, To the Marshal of the Territory of Alaska, Fourth Division, or his Deputy, Greeting:

Whereas, Paul Ringseth hath complained that Sam Velik & Co. justly indebted to Paul Ringseth to the amount of One thousand Dollars and ... cents and the necessary affidavit and undertaking herein having been filed as required by law.

We therefore command you, That you attach and safely keep all the personal property of the said defendant not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, as above stated, to be found in your Division of said Territory, and as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said plaintiff herein. And of this writ make due service and return.

Given under my hand and official seal this 17th day of May 1912.

(Seal)

SAMUEL R. WEISS,

Commissioner and ex officio Justice of the Peace.

(Indorsed): No... In the Commissioner's Court Territory of Alaska, Fairbanks Precinct, Fourth Division. Paul Ringseth, Plaintiff, vs. Sam Velik & Co., Defendant. Writ of Attachment. Returned and filed this 18th day of May 1912. Samuel R. Weiss,



Commissioner and ex officio Justice of the Peace. — 4th Div. Dist. of Alaska, Received May 18 1912 Office of U. S. Marshal, Fairbanks, Alaska. — Marshal's Docket No. 3806. Writ docketed May 18, 1912. Return docketed... 19...)

(Mr Stevens objected to the papers and after discussion announced:)

(Mr Stevens): We deny the jurisdiction of the commissioner's court here, and all proceedings under it; except, I think, there is an admission there that the suit was commenced. That is an admission, because it is not denied. I will read section 77 of the Code. (Reads same. Argument.) We have admitted that there is such a place as Chatanika and such a court as the commissioner's court, and that on such and such a day a summons was duly issued and placed in the hands of the marshal; but we do not admit it was duly served, except that a copy was served on Dan Vlik. But, when it comes to prove what was done under that attachment, there is no admission, and he attempts to prove it by introducing the marshal's return.

(The Court): If that is admitted there is no necessity of introducing it.

(Witness): I received that writ of attachment in the case of Paul Ringseth vs. Sam Vlik & Co. on the 17th day of May 1912. After receiving it I went to Discovery claim on Chatanika and found Dan Vlik, along about 10 or 11 o'clock at night, and served him with a copy of the writ of attachment and the sum-

mons and I posted a notice on the wood pile on a post that was standing close to the wood. Then I went back to Chatanika after posting the notice. I don't think I made my return on the 18th. I think I stayed out at Chatanika all the next day and came in the next day and made the return. I made my return and turned it over to Mr. Carlson, who put it in a file and he attended to it. Before turning it over to him I attached my return to the writ of attachment.

(The Marshal's return was here shown to the witness and was offered and admitted in evidence, read to the jury, and marked Defendant's Exhibit 2, and is in the words and figures following:)

#### DEFENDANT'S EXHIBIT "2".

In the Commissioner's Court for the Fourth Division, Territory of Alaska.

Paul Ringseth, Plaintiff, vs. Sam Velik & Co., Defendants.

United States of America, Territory of Alaska, Fourth Division, ss.—Marshal's Return on Writ of Attachment.

I hereby certify and return that I received the annexed Writ of Attachment, on the 17th day of May 1912, and I executed the same on the 17th day of May 1912;

By delivering a copy thereof duly certified by me to Dan Velik, at Chatanika, Alaska, said Dan Velik being one of the partners of the firm of Sam Velik & Co. And by Attaching all the right, title and interest, of the above named defendants, in and to,



one lot of wood near boiler house on Discovery claim, Chatanika River, and one lot of provisions in cabin on Discovery claim, Chatanika River, Fairbanks Recording district Territory of Alaska.

Dated at Fairbanks, Alaska, this 18th day of May 1912.

H. K. LOVE, U. S. Marshal,  
by L. D. BROWN, Deputy.

Marshal's Fees \$4.00.

(Witness): On the night of the 17th of May, under and by virtue of this writ of attachment, I posted one notice later. First I served the summons on Dan Vlik, and a copy of the writ of attachment. Then I posted a notice on the big wood pile, on one end of the pile. There was a number of piles there; it was 4 ft. wood. I tacked it on to a big birch stick, one of the largest I could find and placed it at the end of the pile, and as I remember it, it claimed 200 cords of wood more or less, and one lot of provisions and cooking utensils. Then I posted another one on—I don't know whether it was a gin pole or a telegraph pole, but it was something about 8 or 10 ft. away from the big pile. There was a small pile of wood near to the cook house, used for cooking, and wood for the cook house. It was just to one side there with the wood saw; there might have been a cord or two there. I didn't place any notice on that small pile. I have neither the original nor a copy of the notice that I posted. The notice were posted on the pile and might have been destroyed, but I don't know. With reference to the contents of that notice.

I don't remember exactly the wording of it. "I claim 200 cords of wood more or less, located on Discovery claim, Chatanika, and all the right, title, and interest to the above wood and cooking utensils, grub,—” and I believe it was a cabin that they owned there, but I won't be positive as to that. I signed that notice "H. K. Love, United States Marshal, by Lysle D. Brown, Deputy." This notice had the title of this case: Ringseth vs. Sam Vlik & Co. That notice was on a regular notice blank, furnished at Chatanika, by the commissioner; they are the same kind of blanks that are used in the marshal's office. Then I went back to Chatanika, back to town, and went to a dance. In a little while,—I don't know how long it was,—they came after me again and said there was another writ of attachment for the same people. That writ was issued by a man named McLean and when I received that I did the same thing over again, attached the same wood and posted the notices right beneath them on the same wood. This was in the second suit from the same commissioner's court. In that second suit I went back to the claim, Discovery claim, and posted a notice right underneath each of those others, one alongside of the wood pile and one beneath on the pile and I gave Dan Vlik a copy of the summons and attachment. When I went back the second time I found Dan Vlik in possession. He was there. I didn't see Mr Pavlovich there at that time. I completed both of these levies probably some place between 11 o'clock on the 17th and 1 o'clock in the morning of the 18th, between 11



o'clock on the night of the 17th and 1 o'clock on the morning of the 18th. When I got through there and when I finished the service of all these papers there were six notices, I believe, posted on this ground.

Q. (Mr. McGowan): I will hand you a blank notice (hands to witness) and ask you if that is the form you used.

A. Yes.

Q. On those same blanks?

A. Yes sir.

(The blank was here offered and received in evidence, read to the jury, and marked Defendants Exhibit "3," and is in the words and figures following:)

### DEFENDANT'S EXHIBIT "3".

Form No. 39.—Public Notice of Attachment.

Office of the Marshal of the United States, .....

District of....., ..... 190...

This.....having been attached by me and now being in my possession by virtue of a..... issued out of the District Court of the United States for the.....District of.....

Notice is hereby given that any person removing or attempting to remove said.....without my written permission, or in any way interfering with said..... or my duly authorized Deputy or Keeper in charge thereof, will be prosecuted to the extent of the law.

.....U. S. Marshal.

(Witness): In using these blanks we changed them from the District to the Commissioner's Court,

changed it to Commissioner's Court, Chatanika, I filled it in. "This lot of wood, two hundred cords more or less, having been attached, and now being in my possession by virtue of a writ of attachment issued out of the Commissioner's Court at Chatanika for the Fourth Division, District of Alaska. Notice is hereby given that any person removing or attempting to remove said wood or any part thereof without my written permission, or in any way interfering with said wood or my duly authorized deputy or keeper in charge thereof, will be prosecuted to the extent of the law. H. K. Love, U. S. Marshal, by Lysle D. Brown, Deputy." I mentioned the number of cords in there,—everything I said a while ago,—everything that I attached was mentioned in that notice.

(Counsel for defendant here offered the writ of attachment in the case of McLean vs. Vlik & Co., which was admitted, read to the jury, and marked Defendants Exhibit "4", and is in the words and figures following:)

#### DEFENDANT'S EXHIBIT "4".

In the Commissioner's Court (Chatanika) For Fairbanks Precinct, Fourth Division Territory of Alaska

John McLean, Plaintiff, vs. Sam Velik & Co., Defendant. No. 36 Writ of Attachment.

The President of the United States of America, To the Marshal of the Territory of Alaska, Fourth Division, or his Deputy, Greeting:

Whereas John McLean hath complained that Sam Velik & Co. justly indebted to John McLean to the



amount of One thousand Dollars and....cents and the necessary affidavit and undertaking having been filed as required by law.

We therefore command you, That you attach and safely keep all the personal property of the said defendant not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff demand, as above stated, to be found in your Division of said Territory, and as shall be of value sufficient to satisfy the said debt and costs and disbursements of the said plaintiff herein. And of this writ make due service and return.

Given under my hand and official seal this 18th day of May 1912.

(Seal)

SAMUEL R. WEISS,

Commissioner and ex officio Justice of the Peace.

(Indorsed): No... In the Commissioner's Court Territory of Alaska, Fairbanks Precinct, Fourth Division. Jack McLean, Plaintiff, vs. Sam Velik & Co., defendant Writ of Attachment Returned and filed this 18th day of May, 1912 Samuel R. Weiss, Commissioner and ex officio Justice of the Peace. 4th Div. Dist. of Alaska Received May 18.. 1912 Office of U. S. Marshal, Fairbanks, Alaska. —Marshal's Docket No. 3807. Writ docketed May 18— 1912. Return docketed...)

(Witness): When I served this McLean writ I just repeated the same as the first. I went from the dance at the hall and went to Discovery claim on Chatanika and served the writ of attachment and summons, duly certified, on Dan Vlik, a member

of the firm of Sam Vlik & Co., and I posted one notice on the wood pile alongside of the Ringseth notice, and one underneath on the telegraph post or gin pole—whatever it was. That was all. I read him a copy; he said he couldn't read English and I lit a candle in his cabin and read it to him, and told him that he would have to appear in Court. I left with Dan Vlik a copy of the summons and complaint and the attachment. In making that levy I used the same form that was introduced here a moment ago and marked Defendant's Exhibit 3, making the same changes as stated in the others, as stated in my testimony with reference to Defendant's Exhibit 3. After making these levies I left a custodian in charge of this property that I levied on. Paul Ringseth was appointed custodian of the wood, he was appointed by me. I conferred with the commissioner, Mr. Weiss, and he told me that would be all right, told me to do that. I then left the ground and returned to Chatanika, where I remained all night and left the next morning. After I had completed my service in the McLean case I made a return on the McLean attachment.

(Counsel for defendant here produced said return and handed same to the witness for inspection).

That is the return that I made.

(The return was here offered and admitted in evidence, read to the jury and marked Defendant's Exhibit "5", and is in the words and figures following:)



## DEFENDANT'S EXHIBIT "5".

In the Commissioner's Court for the Fourth Division Territory of Alaska.

John McLean, Plaintiff, vs. Sam Velik & Co., Defendant.

United States of America, Territory of Alaska, Fourth Division, ss.—Marshal's Return on Writ of Attachment.

I hereby certify and return that I received the annexed Writ of Attachment on the 18th day of May 1912 and executed the same on the 18th day of May 1912:

By delivering a copy thereof duly certified by me to Dan Velik, at Chatanika, Alaska, said Dan Velik being one of the partners of the firm of Sam Velik & Co. And by Attaching all the right, title, and interest of the above named defendants, in and to one lot of wood and provisions situated on Discovery claim, Chatanika River, Fairbanks Recording District, Territory of Alaska.

Dated at Fairbanks, Alaska, this 18th day of May 1912.

H. K. LOVE, U. S. Marshal,  
by L. D. BROWN, Deputy.

Marshal's Fees \$4.00.

## CROSS EXAMINATION.

(By Mr Stevens).

(Witness): I had been a deputy marshal a little over three months prior to the 17th day of May 1912. I was located in Fairbanks; I was an office deputy, I was supposed to be. I was an office deputy

in the office here in Fairbanks for nearly six months, between five and six months. I would go out on trips to the creeks probably two or three times a week and had made attachment services before making the ones testified to by me; I don't remember how many. I went back there on the 18th of May and posted another notice on the big pile of wood, in the McLean case. It is not a fact that I came back and reported to Mr Love in his office that I had attached 3 or 4 cords of wood. That was a misunderstanding over the telephone. Mr. Carlson asked me over the telephone what I had attached. I generally called up every day when I was out on the creeks. I said: "We attached a bunch of wood out here, but I guess we can only hold 3 or 4 cords." That is what he claimed. I told him (meaning Dan Vlik) "there is a bond put up and if they sell the wood you will get damages, but I have got to attach the wood," so I posted the notices on the wood and explained to him in both instances. I posted those notices on the night of the 17th and 18th, and telephoned the marshal's office next day, on the morning of the 18th. Both attachments were served near midnight and the wood was under both attachments when I telephoned. The notices were posted within an hour or two probably; it was between 11 o'clock p. m. of the 17th of May and 1 o'clock a. m. of the 18th of May that both attachments were served. I know that Sam Weiss issued the attachments some time about midnight of the 17th. I didn't report to the office that I had attached 3 or 3½ cords of wood.



When Mr Carlson saw me next day and saw my return, he said "This is not what you told me over the 'phone". I said "You misunderstood me." When I told him over the telephone I said: "All we can hold is the three cords; they (meaning Sam Vlik & Co.) claim not to own the other 200 cords." They didn't mention any names. He (Dan Vlik )said "We don't own that". There was some fellow out there at the wood pile when I was there and he said "The wood don't belong to Vlik." I don't know his name. I said I had orders to attach it and would attach it. He was a foreigner. At the time I levied on this wood I didn't see any other notice on the wood or around the wood any place. I didn't make an inventory before I attached; I did later; it wasn't exactly an inventory; I made note of 200 cords of wood and cooking utensils. I put notices on a pole as well as on the wood. It is the usual custom to post three or four notices around in conspicuous places. It is not a fact that I put a notice on the pole and didn't put any on the big wood pile; I put notices on both; the same kind of notices. When Ringseth was appointed custodian he was in Mr Weiss's office down at Chatanika and Mr Weiss was there. Mr Ringseth was appointed custodian of that wood right there when we were talking; it was agreed that he was to be the custodian; this was done before the levy was made. I didn't appoint him in writing. I don't know whether Mr Weiss gave him any authority in writing or not. I remember being in judge Day's office when this transaction was discussed I

was not in company with Peter Vidovich. I was in Mr Day's office a number of times this summer. He asked me several times about this transaction; I never mentioned it personally to him in my life, he mentioned it to me. I have no idea as to the time. I think it was after this suit was brought, late in the summer time, after I left the marshal's office.

Q. Were you there one time when Peter Vidovich was there?

A. I think I have been there two or three times when he was either there or leaving there.

Q. I will ask you, Mr Brown, whether or not it is true that, at one time last summer, when you were in judge Day's office, and Mr Pete Vidovich was there, and no one else being present, just the three of you, judge Day, Peter Vidovich, and yourself, that you were talking about this attachment that we are now taking about, and that you stated to judge Day and to Peter Vidovich, in substance, that you only attached three or three and a half cords of wood, and that was on the small pile, and that was where you placed your notices, and that was all the wood that you did attach. Didn't you say that.

A. I did not.

Q. Or words to that effect?

A. No, I never did.

Q. You swear positively you did not?

A. I swear positively the only thing I ever told judge Day is the same words I told Carlson over the telephone; that the boys—that the only wood they claimed to own was three and a half cords. And



I told just the words as I remembered them; as I explained them to him, and what he told me.

Q. I asked you whether or not you told to Judge Day and Peter Vidovich on that occasion that you posted the notices on the small pile.

A. No.

Q. And didn't on the large pile?

A. I never said a word to that effect in any way, shape, or form.

Q. And that, when you referred to the pile of wood that you attached, you referred to a pile of three or three and a half cords?

A. I did not.

Q. You deny that positively?

A. I deny that positively.

(Counsel for defendant here offer in evidence the original summons in the case of Ringseth vs. Sam Vlik & Co., which was admitted, read in evidence, and marked Defendant's Exhibit "6", and is in the words and figures following:)

**DEFENDANT'S EXHIBIT "6".**

In the Commissioner's Court For Fairbanks Precinct, Fourth Division, Territory of Alaska

Paul Ringseth Plaintiff vs. Sam Velik & Co Defendant No. . . . . Summons

To the United States Marshal of the Territory of Alaska, or any Deputy:

In the name of the United States of America, we command you to summon Sam Velik & Co. to appear before me the undersigned, a Justice of the Peace in Fairbanks Precinct in said Territory, on the 24th day

of May 1912 at the hour of two o'clock in the afternoon of said day at my office in the Court House at Chatanika in the said precinct, to answer the complaint of Paul Ringseth founded upon money and wherein he demands one thousand Dollars.

Given under my hand and official seal this 17 day of May 1912.

(Seal)

SAMUEL R. WEISS,

Commissioner and ex officio Justice of the Peace.

(Indorsed): No. . . In the Commissioner's Court Territory of Alaska, Fourth Division, Fairbanks Precinct. Paul Ringseth Plaintiff vs. Sam Velik & Co. Defendant Summons . . . Attorneys for plaintiff. Returned and filed this 18th day of May 1912 Samuel R. Weiss, Commissioner and ex officio justice of the Peace. 4th Div. Dist. of Alaska Received May 18 1912 Office of U. S. Marshal Fairbanks, Alaska.— Marshal's Docket No. 3806. Writ docketed May 18 1912 Return docketed. . . . . 19, . . .

PAUL RINGSETH, a witness called in behalf of the defendant, being sworn, testified substantially as follows:

DIRECT EXAMINATION.

(By Mr McGowan)

(Witness): I am the plaintiff in this case of Ringseth vs. Sam Vlik & Co., which was commenced before justice Weiss.

Q. Did you attend before the commissioner at Chatanika at the time that the summons was returnable.

(Mr. Stevens): We object as being immaterial,



incompetent, and the only possible purpose of Mr McGowan is to bolster up and change by extrinsic testimony—by oral testimony, the records in this case. The law is that you can neither explain, change, or add to the court proceedings.

(Mr McGowan): He can tell what happened at the trial.

(Mr Stevens): No sir, he can't do that.

(Mr McGowan): There is nothing in this judgment to show the hour it was rendered, which I intend to prove by this witness. This record shows that the case came on regularly for trial at 2 o'clock, which was the hour fixed. It shows further that, on the 24th day of May 1912, this judgment was rendered, but there is no time shown in the judgment or in the docket as to the time of rendition. We can prove by positive testimony of witnesses in the court at that time that the judge did wait an hour before signing the judgment. That is the purpose of the testimony at this time of this witness.

(The Court): You can hardly prove that by parol testimony.

(Mr. Clark): We are not asking to change the record, but to explain it.

(The Court:.) It seems that that would be changing, because the record on its face appears to show that the judgment was rendered at 2 o'clock.

(Mr Stevens): There is no testimony that will allow them to bolster up the record.

(Mr McGowan): This is not for the purpose of bolstering up the record, but to show a fact. The

docket is absolutely silent as to the hour this took place.

(Mr McGowan argues the matter of the offer of the parol testimony and the objections made by plaintiff.)

(The Court): I think the objection should be sustained.

(Mr McGowan): The purpose is to show that he left out "3 p. m."

(The Court): I think that is something you can not introduce here. You may make your offer if you wish to.

Ex. 5—(Defendants except; exception allowed.)

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SAMUEL R. WEISS, a witness called in behalf of defendant, being sworn, testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr McGowan)

(Witness): I am commissioner and ex officio justice of the peace at Chatanika, Fairbanks Precinct, Alaska. I have held that office for two years. I was Commissioner in the months of May and June 1912. (Witness produces his docket). This is my docket. Pages 500-501 of my docket refer to case No. 35, Paul Ringseth vs. Sam Vlik & Co., and pages 502-3 of the same docket refer to the case of Jack McLean vs. Sam Vlik & Co.

(Counsel for defendant here offer in evidence the entry on page 501 of said docket, beginning about the middle of the page, the first



day being 24 May, and ending with the words "Commissioner and ex officio Justice of the Peace", which was admitted and read to the jury, and a certified copy thereof was marked Defendant's Exhibit "7", which is in the words and figures following:)

DEFENDANT'S EXHIBIT "7".

May 24 The case came up for trial this 24th day of May 1912 at 2 P. M.

Plaintiff present. Defendants absent. So the case went by default. Therefore

It is ordered and adjudged that Paul Ringseth, plaintiff, do have and recover of and from the said defendant Sam Velik & Co., defendants, the sum of One Thousand 00-100 Dollars, with interest thereon at the rate of 8 per cent per annum until paid and costs of suit amounting to eighteen and 70-100 Dollars.

Judgment rendered this 24th day of May 1912.

Let execution issue.

SAMUEL R. WEISS,

Commissioner & ex Officio Justice of the Peace.

(Counsel for defendant here offer in evidence the entry on page 503 of said docket, the first date being May 24, and ending with the words "Commissioner and ex officio Justice of the Peace", which was admitted and read to the jury, and a certified copy thereof was marked Defendant's Exhibit "8", and is in the words and figures following:)

## DEFENDANT'S EXHIBIT "8".

May 24 The case came up regularly for trial this 24th day of May 1912, at 3 o'clock in the afternoon. Plaintiff present. Defendants absent, so the case went by default, therefore it is adjudged and ordered that Jack McLean plaintiff do have and recover of and from Sam Velik & Co. defendants the sum of One Thousand 00-100 Dollars with interest thereon at 8 per cent and costs taxed at \$18 70-100 Judgment rendered this 24th. day of May 1912.

Lat execution issue.

SAMUEL R. WEISS

Commissioner and ex officio Justice of the Peace.

Q. (Mr McGowan): Referring to case No. 35, Paul Ringseth vs. Sam Vlik & Co., and to page 501 of your docket, to the entry of May 24th, will you kindly state when that entry was made.

(Mr. Stevens): We object. The docket is the best evidence, and the Court himself can not at this time contradict his record, and therefore it is inadmissible for any purpose.

(The Court): Objection sustained.

(Mr McGowan): We offer to prove at this time by the testimony of this witness, that the entry, shown on page 501 of the justice's docket in the case of Paul Ringseth vs. Sam Vlik & Co., being the judgment in said case, was not made or entered in said docket until after the hour of 3 p. m. on the 24th day of May 1912, and that judgment was not rendered until that time, and that he waited one hour after the hour of 2 o'clock on that day.



(Mr. Stevens): We object to that testimony as not competent, being an attempt to contradict the record, which is against public policy, and we ask the Court to deny the offer and instruct the jury not to consider that offer, as it has nothing to do with this case.

(The Court): The offer is denied, and the jury are instructed to not consider the offer as testimony in this case.

Ex. 6. (Mr McGowan): We except. We make the same offer in the case of Jack McLean vs. Sam Vlik & Co., as it appears on page 502 and 503 of the justice's record, with this exception, that the hour should be changed from 2 to 3 o'clock, and the entry of the judgment until after the hour of 4, without repeating the language, if that is satisfactory.

(Mr Stevens): We make the same objection.

(The Court): The offer is denied.

Ex. 7. (Mr McGowan): We except.

(The Court): And the jury is instructed to disregard the offer.

(Witness). After the entry of the judgment in the case of Ringseth vs. Sam Vlik & Co. I took further proceedings in the action as shown by my docket. My docket shows an entry on May 28. (Counsel for defendant hand a paper to the witness). This is the execution that I issued in this case.

(Counsel for defendant here offer in evidence the execution and the return thereon in

the case of Ringseth vs. Sam Vlik & Co., which was admitted, read to the jury and marked Defendant's Exhibit "9", as is in the words and figures following:)

DEFENDANT'S EXHIBIT "9".

In the Justice's Court For the Territory of Alaska,  
Fourth Division Fairbanks Precinct

Paul Ringseth Plaintiff vs. Sam Velik & Co. Defendant. No..... Execution.

The President of the United States of America,  
To the Marshal of Said Division and Territory,  
or any Deputy: Greeting:

Whereas, Paul Ringseth recovered judgment against Sam Velik & Co. in the Justice's Court for the Fairbanks Precinct, said Division and Territory, on the 24th day of May 1912, for the sum of One Thousand Dollars, with interest thereon at the rate of eight per cent. per annum until paid, and costs of suit, amounting to Eighteen and 70-100 Dollars

Therefore, in the name of the United States of America, you are hereby commanded to levy upon, seize and take into execution the personal property of the said Sam Velik & Co. in your Division of said District sufficient, subject to execution, to satisfy said Judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law, and make return of this writ within thirty days from the date hereof.

Herein fail not, and have you then and there this writ.



Witness my hand and the seal of said Court hereto affixed this 24th day of May A. D. 1912.

(Seal)

SAMUEL R. WEISS.

Commissioner and Ex Officio Justice of the Peace.

Marshal's Return.

United States of America, Third Division, Territory of Alaska.

I hereby certify, That I received the within execution on May 25th, 1912 and executed the same May 25, 1912; By seizing and taking into my possession One hundred cords (100) more or less of four foot Birch wood now situated on Discovery claim Chatanika Flats. Also by seizing all cooking utensils and other personal property now situated in cabin at said place and posting notices of Marshal's sale in three public places within five miles of said property to wit: One on wood at said place; one on post near Grand Hotel in Chatanika, one on post office door at Cleary City. Said sale to be held near Boiler House on said claim on the 6th day of June 1912. Dated at Fairbanks, Alaska this 28th day of May 1912.

H. K. LOVE, United States Marshal,

by L. D. BROWN, Deputy.

Marshal's Fees \$4.00, Mileage \$13.20.

(Indorsed:) No.... Justice's Court Territory of Alaska Fourth Division. Paul Ringseth Plaintiff vs. Sam Velik & Co. Defendant Execution. —4th Div. Dist. of Alaska Received May 25 1912 Office of U. S. Marshal Fairbanks, Alaska—Marshal's Docket No. 3806 Writ docketed May 25 1912 Return docketed

June 7 1912.)

(Counsel for defendant here hand another paper to the witness).

(Witness): This paper is also one of the files of my office.

(Counsel for defendant here offer said paper, being the execution in the case of Jack McLean vs. Sam Vlik & Co., in evidence, and the same having been admitted, is marked Defendant's Exhibit "10", and is in the words and figures following:)

DEFENDANT'S EXHIBIT "10".

In the Justice's Court for the Territory of Alaska,  
Fourth Division Fairbanks Precinct

Jack McLean, Plaintiff vs. Sam Velik & Co. Defendant. No. 36. Execution.

The President of the United States of America,  
To the Marshal of said Division and Territory, or  
any Deputy, Greeting:

Whereas, Jack McLean recovered judgment against Sam Velik & Co in the Justice's Court for the Fairbanks Precinct, said Division and Territory, on the 24th day of May 1912, for the sum of One Thousand Dollars, with interest thereon at the rate of eight per cent. per annum until paid, and costs of suit, amounting to eighteen and 70-100 dollars

Therefore, in the name of the United States of America, you are hereby commanded to levy upon, seize and take into execution the personal property of the said Sam Velik & Co. in your Division of said District sufficient, subject to execution, to satis-



fy said judgment, interest and increased inteest, costs and increased costs, and make sale thereof according to law, and make return of this writ within thirty days from the date hereof.

Herein fail not, and have you then and there this writ.

Witness my hand and the seal of said Court hereto affixed this 11th day of June, A. D. 1912. Samuel R. Weiss, Commissioner and ex officio Justice of the Peace. (Seal)

(Indorsed:) Justice's Court Territory of Alaska, Fourth Division Jack McLean Plaintiff vs. Sam Velik & Co. Defendant Execution.

(Witness): This execution was returned and filed in my office on July first, that appears from my docket.

(Mr Stevens): I would like to ask Mr Weiss some questions. It may not be technically cross-examination.

(Mr McGowan): Then you will make him your own witness.

(Mr Stevens): I will ask him the questions.

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SAMUEL R. WEISS, recalled as a witness in behalf of plaintiff, testified substantially as follows:

(By Mr Stevens):

(Witness): In the case of Ringseth vs. Sam Vlik and Company, concerning which I have been testifying, the execution was issued and returned and the marshal made a sale of the wood in controversy

thereunder. My docket shows that the sale was made. (Witness produces docket). There is a record of the sale (pointing to docket).

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LYSEE D. BROWN, recalled as a witness in behalf of defendant, testified substantially as follows:

(By Mr. McGowan): (counsel hands Exhibits 9 & 10 to witness).

(Witness): I received Exhibit No. 9 but not No. 10; Exhibit No. 9 is the execution in the case of Paul Ringseth vs. Sam Vlik & Co.; May 25th is when I received it.

Q. What did you do when you received that execution, Defendant's Exhibit 9?

A. I posted notices of marshal's sale; one on the postoffice at Cleary City, one on a telephone post, I mean, in front of the postoffice at Cleary City, and one on the claim on the wood, near the wood. I don't remember exactly where I posted the notices.

Q. Have you a copy of the notice of sale you posted?

A. This is my return here?

Q. That is not your return, but this one is, isn't it? (producing).

A. This is mine here (indicating).

Q. Where is the original notice?

A. It must be in the marshal's office on file.

(The Court): This sale seems to be admitted.

Mr. Stevens): We admit on page 4, subdivision I, that said defendant, on the 25th day of May, 1912,



duly advertised all of said wood for sale by posting notices in the manner aforesaid, which notices provided that the said property would be sold on the 6th day of June 1912, etc., and the amount that you received for it was \$1076.25, and that it brought \$8.75 a cord. We admit all that by our reply, so it is unnecessary to go into proof of these notices.

(The Court): You deny any sale under the other execution.

(Mr Stevens): We deny any valid sale of course. We admit that he sold it under this execution. We deny that the execution was valid and that the judgment was valid, but we admit that he advertised it to sell it and did sell it.

(Mr McGowan): You admit that the marshal advertised the property as required by law, and sold it under execution.

(Mr Stevens): Yes.

(Mr McGowan): That goes to the case of Ringseth vs. Sam Vlik & Co.

(Mr Stevens): Yes.

(Mr McGowan): And in regard to the McLean case against Sam Vlik & Co.—

(Mr Stevens): I will look and see if we admit it. We deny that he duly levied, etc. Page 7.

(Mr McGowan): The Ringseth one is admitted. Is that correct?

(Mr Stevens): We admit that you posted notices and made the sale.

(Mr McGowan): Posted three notices, as required by law?

(Mr Stevens): Yes; we can't deny it, and so admit it.

Q. (Mr McGowan): Did you ever receive the execution, Defendants Exhibit 10, in the case of McLean vs. Velik & Co. at any time?

A. No sir.

(Mr Stevens): We admit that you posted notices in the manner prescribed by law, but not that any of them were valid.

### CROSS EXAMINATION.

(By Mr. Day).

(Witness): I think I recollect the talk that three of us had in Mr Day's office. I don't remember it word for word; I don't remember what was said. I remember I was up to see you (meaning Mr. Day) and I think I remember Mr Vidovich being there. I can't be positive. I think he was there two or three times.

Q. Now, at that time, didn't you say to me that you did not make any levy on that big pile of wood?

A. No sir, I did not.

Q. Didn't you at that time say that you attached that small pile of wood near the boiler house?

A. No. I said—What I told you was the same thing I told the rest of them! that you probably could only hold that 3½ cords of wood, as the other men claimed it—the plaintiff in this case claimed the wood and Sam Vlik & Co. didn't own it, and we probably could only hold 3½ cords. That is what I told you; the same as I told the marshal over the telephone, and he misunderstood it.



(It was here admitted that the witness was subpoenaed to attend this trial in behalf of the plaintiff in this action.)

Q. And didn't you say to Mr Vidovich and me, there in my office that day, that you would go on the stand in this case and testify that you only levied on that small pile of wood?

A. I did not.

Q. Under the attachment?

A. I did not.

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S. B. WAITE, a witness called in behalf of defendant, being sworn, testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr McGowan).

(Witness): I am a deputy in the marshal's office of this division and have been for two years; I was deputy marshal in the months of May and June 1912.

(Defendant's Exhibit 10 handed to witness, being execution in case of McLean vs. Vlik & Co. Witness examines papers.)

(Witness): I have seen this paper before and my return indorsed thereon shows that I received it on the 12th of June 1912. After receiving it I proceeded to Chatanika. I don't remember exactly when I arrived there. After arriving there I posted notices of sale on the property covered by this execution. I posted notices of sale, one in the post-office at Cleary, on the 14th day of June, one on the boiler house on the claim involved, and one at Chat-

anika on a telephone pole. Three notices were all that I posted. (A paper is here handed to witness by counsel for defendant). This is a copy of the notice I posted. These notices were within five miles from the property.

(Counsel for defendant here offered the notice in evidence, same was admitted, and marked Defendant's Exhibit 11.)

(Mr Stevens): I think we have admitted there was a sale made.

(Mr McGowan): In this case as well?

(Mr Stevens): I don't know.

(Mr McGowan): Do you admit it now, that a sale was made?

(Mr Stevens): Yes, that you sold our property; I don't admit a legal sale, or that it was done legally.

Q. (Mr McGowan): Is this (producing) your return made by you on that execution?

A. Yes.

(The return was here marked Defendant's Exhibit 12.)

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S. B. WAITE, recalled as a witness in behalf of defendant, testified substantially as follows:

DIRECT EXAMINATION.

(Mr McGowan): I will now read defendant's exhibit "11", notice of marshal's sale, which was introduced in connection with the evidence of Mr. Waite. (Reads)



## DEFENDANT'S EXHIBIT "11."

Form No. 176.

Notice of Marshal's Sale.

United States of America, 4th Divn District of  
Alaska ss:

Public notice is hereby given, that by virtue of a writ of Fieri Facias (or execution), dated June 11th, 1912, A. D. 190.., issued out of the Commissioner's Court, for the United States for the 4th Division District of Alaska at Chatanika on a judgment rendered in said Court, on the 24th day of May, 1912, A. D. 190.., in favor of Jack McLain, plaintiff and against Sam Velik & Company, Defendants I have on this 14th day of June, 1912, A. D. 190.., levied upon the following described personal property, situated in the Fairbanks Recording District Territory of Alaska, to wit:

Forty (40) cords, more or less, of Birch and Spruce wood, one large tent, one cooking stove, all cooking utensils, provisions, etc. belonging to defendants; said property being now situate on what is known as the Sam Velik & Co. lease on the Chatanika Flats kust below the town of Chatanika. and that I will, accordingly, offer said personal property for sale, at public vendue to the highest and best bidder, for cash, on the 25th day of June, 1912 A. D., 190.., at 11 o'clock a. m., at the boiler house on said same Velik & Co. lease on the Chatanika Flats just below the town of Chatanika.

Dated at Fairbanks, Alaska, June 12, 1912, A. D.  
190..

H. K. LOVE, U. S. Marshal,  
4th Division, District of Alaska  
By S. B. WAITE, Deputy.

.....Plaintiff's Attorney.

(Mr. McGowan): We shall also read the marshal's return made by Mr. Waite, which is marked Defendant's Exhibit "12", in the same case of McLean vs. Sam Vlik & Co. (Reads):

DEFENDANT'S EXHIBIT "12".

In the Commissioner's Court for the Territory of Alaska, Fourth Division.

Jack McLean Plaintiff, vs. Sam Velik & Co. Defendants—Marshal's Return on Execution.

I hereby certify and return that I received the attached writ of execution on the 12th day of June 1912, and that on the 14th day of June 1912, I duly executed the same by levying on the following described personal property situate on the lease of Sam Velik & Co. on the Chatanika Flats, just below the town of Chatanika as follows, to wit:

Forty (40) cords, more or less, of Birch and Spruce wood, one large tent, One cooking stove, all cooking utensils, provisions, etc., belonging to the defendants.

And by posting notices of sale in the following described places: one on the boiler house on the Sam Velik lease, one at the town of Chatanika, one on the Post Office at Cleary. And that thereafter on the 25th day of June 1912, the time set for said sale, I did sell to Paul Ringseth, he being the highest and best bidder, all of the right, title, and in-



terest of said Defendants, Sam Velik & Co. in and to the above described personal property for the sum of two hundred seventy five dollars (\$275.00)

H. K. LOVE, U. S. Marshal,

By S. B. WAITE, Deputy.

Levy fee \$4.00, Expenses \$30.00, Commission \$8.25.

### CROSS EXAMINATION.

(By Mr. Stevens).

(Witness): I have examined the records of the marshal's office as to the amount of wood attached by the deputy marshal in the case of Ringseth vs. Sam Vlik & Co. and the record shows the same as my return, which was just read. I don't know the amount of wood attached under the attachment, I have not the record with me.

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M. O. CARLSON, called as a witness in behalf of the defendant, being sworn, testified substantially as follows:

### DIRECT EXAMINATION.

(By Mr. McGowan).

(Witness): I am a deputy marshal in this division; have been in the office of the marshal for several years last past as a deputy; my official title is office deputy marshal. I was such deputy during the entire year of 1912.

(Counsel hands to the witness Defendant's Exhibit 9, being the execution in the case of Ringseth vs. Vlik & Co.)

The return on that exhibit was made by me.

(The return was here offered in evidence, admitted, read to the jury, and marked Defendant's Exhibit 13, and is in the words and figures following:)

DEFENDANT'S EXHIBIT "13".

In the Justice's Court for the Fairbanks Precinct, Fourth Division, Territory of Alaska, at Chatanika.

United States of America, Territory of Alaska, Fairbanks Precinct, ss.—Marshal's Return on sale under Execution.

Paul Ringseth, Plaintiff vs. Sam Velik & Co. Defendants.

I hereby certify and return that on the 6th day of June, 1912, at 2 p. m. at the boiler house on the Sam Velik & Co. lease on the Chatanika Flats, the time and place appointed for sale in the Notice of Marshal's Sale posted on the 25th of May, 1912, in this case, I did offer for sale and did sell to the highest and best bidder for cash, to Paul Ringseth, for One Thousand seventy six and 25-100 (\$1076.25 Dollars, he being the highest and best bidder attending said sale, and that being the highest sum then and there bid, all the right, title and interest of defendants, Sam Velik & Co. in and to One Hundred twenty three cords of the four foot birch wood now situate on said lease, said sale being at the rate of eight and 75-100 (\$8.75) Dollars for each cord of wood sold, and said amount being in full for judgment and costs in the case.

Said wood being situate in the Fairbanks Record-



ing District, Territory of Alaska.

Dated at Fairbanks, Alaska, June 7th, 1912.

H. K. LOVE, United States Marshal

By M. O. CARLSON, Deputy.

Commission on sale \$26.52, Expense \$13.00, Total \$39.52.

(Witness): I received this execution in my official capacity and went out and sold under it. I went out to Chatanika and measured the wood; the wood was measured on the 6th of June by myself, together with Mr Ringseth and also Mr McLean. I found 161 cords to be the correct measurement, and out of that 161 I sold in the case of Ringseth vs. Sam Vlik 123 cords. I sold the wood to Mr Ringseth at that time, 121 cords of wood there in a pile; two cords he admitted had been used and Mr Pavlovich was there at the time and said also that two cords had been used. So I sold Mr Ringseth 121 cords and he paid for the two cords that had been used, making 123 cords. It took Mr Ringseth, Mr McLean, and myself a couple of hours or more to measure this wood.

#### CROSS EXAMINATION.

(By Mr Stevens).

(Witness): I have a record in my office of the proceedings in this case, of what the marshal did. That record does not disclose how many cords of wood were attached by the marshal under the attachment in the Ringseth case; it just says "wood attached—"Wood, provisions, etc." It doesn't say any number of cords. The same is also true in regard

to our records in the case of McLean vs. Sam Vlik & Co; it doesn't say the number of cords attached. Our record does not say "a pile of wood near the boiler house."

(Mr McGowan): The record is here and I submit the record is the best evidence.

(Mr Stevens): The record is there, but if the witness knows,—this is only a brief matter,—to save time.

(Witness): I know Mr Peter Vidovich.

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JOHN McLEAN, a witness called in behalf of the defendant, being sworn, testified substantially as follows:

DIRECT EXAMINATION.

(By Mr McGowan).

(The Witness): I am the plaintiff in the case of McLean vs. Sam Vlik that has been mentioned here today. I know when the attachments were levied on the property of Sam Vlik & Co., my attachment and the Ringseth attachment. They were levied on the evening of the 17th of May, the first one was levied half an hour or an hour before mine.

Q. Do you know about the time, whether it was before or after midnight or in the vicinity of midnight of the 17th?

A. I delivered the papers to Sam Weiss about 11 o'clock.

Q. Were you present on the ground at the time the deputy marshal made the levy?

A. No sir, I didn't go on the ground at all.



Q. When did you go to the ground?

A. The next morning.

Q. The next morning did you see any notices on the ground?

A. I did.

Q. What sort of Notices?

A. Attachment notices on the wood pile.

Q. In one case or two cases?

A. Two cases.

Q. Did you see Ringseth's name on one?

A. I did.

Q. And your own name on the other?

A. Yes sir.

(Witness): I saw notices on the wood pile; there were two or three notices stuck on the post there and one on the gallows frame. They were signed by an official; they were notices stuck up by the deputy marshal, Brown, that they attached so many cords of wood belonging to Sam Vlik & Co. The names of the parties were on them, Jack McLean against Sam Vlik & Co., and Paul Ringseth against Sam Vlik & Co. I saw these four notices on the morning of the 18th. I was on the ground of Sam Vlik & Co. on the 18th of May and remained there for six months afterwards and didn't go away from there until last January. I went on the ground of Sam Vlik & Co. on the 18th of May and went to work and we took over the lay ourselves, three or four of us. I worked there about two months after that. When I went there on the morning of the 18th of May, I have an idea about the quantity of

wood on the ground; in the big pile 160 cords and something; the marshal and I and Paul (meaning Ringseth) measured it. There was also about two or three cords of 16 ft wood, heavy poles, and a little pile of about 2 cords,—I mean 16 inch wood in the little pile. The wood was measured the day that Mr Carlson was up there; I cannot fix the month or day. Carlson, Ringseth, and myself measured the wood on that day and in the big pile there was about 162 cords.

Q. I don't care about the small pile. Now then, did you remain on the Sam Vlik & Co. lease within sight of all this property from the 18th day of May until the 25th day of May?

A. Yes.

Q. Were you there on the 24th day of May?

A. Yes.

Q. On the 25th day of May?

A. Yes sir.

Q. How long afterwards?

A. For two months afterwards.

Q. Were you still there in possession of this property?—at the time of the sale?

A. Yes sir, I was.

Q. What were you doing there during all of that time between the 16th of May and the 6th of June?

A. I was living there.

(Witness): Mr Ringseth and myself placed attachments on all this property and I went there on the 18th of May; I saw some notices on the ground; I don't remember if any number of cords



of wood was referred to in these notices.

Q. Now then, you went there for what purpose? Do you remember that? What did you go there for? On that Sam Vlik & Co. lease? Do you understand what I mean?

A. Yes I guess I do?

Q. Then answer, please.

A. Paul said he was supposed to look after this wood. I said: "I am working here all the time mining; I am supposed to look after my own part of it; at the same time I will attend to yours. That was all that was said.

(Witness): On the 6th day of June and also on the 26th day of June, during the month of June 1912, I was living in the vicinity of the Chatanika Flats,—was employed in mining operations—and during all that time I knew the market value of wood, of 4 ft. birch wood, at Chatanika, where the wood in controversy in this case was situate, and the market value of wood during that time was \$10.00 a cord.

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SAMUEL R. WEISS, recalled as a witness in behalf of defendant, testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr McGowan):

(Witness): During the month of June 1912, and between the 6th and the 25th of June, I was engaged in mining at Chatanika Flats and I know this wood in controversy in this case, and also the market value of wood. This kind of wood, at the

place where the wood in controversy in this case was located, I bid \$8.50 for it, that is all I considered it worth at that time. I bid that for it. It was worth \$10.00 a cord on the Flats, but it would have cost more than \$2.00 a cord to move it from the place at which it was located. At the place where the wood in controversy in this case was located at that time its market value was \$8.50 a cord; that is all I bid on it and I needed wood at that time.

### CROSS EXAMINATION.

(By Mr Stevens).

(Witness): This wood was located at a place about 800 yards from the place where I was conducting mining operations. I didn't consider the value of the wood was anything there at the place where it was located, for the reason that there was nothing there at the place where they were mining. At times it costs more to move wood in the summer time than it does in the winter; it is slower work when it has to be loaded on a wagon than when you load it on a bobsled; it costs more to move this wood in summer than in winter. Wood to be used right on the premises is worth more than if you had to move it. I would consider \$10.00 a cord a fair market price for that wood, if you had use for it where it was located.

Q. Suppose you wanted to work this particular ground and you had to move the wood on there in the month of June, it would cost you \$12.00 or \$15.00 a cord to buy it and get it there?

A. No.



Q. How much would it cost?

A. \$10.00, instead of \$12.00 or \$15.00.

(Witness): I bid on that wood, I think I was next to the highest bidder on it; I bid \$8.50 a cord, and I would have to move it about 800 yards and I considered that was all it was worth. It does not necessarily cost more to move wood from the woods in the summer time than in the winter. I am moving 1500 cords this summer for \$7.00 a cord.

#### REDIRECT EXAMINATION.

(By Mr McGowan).

(Witness): The wood in controversy in this case was put on the claim in question in the winter time. My testimony with reference to the value of wood as given by me for the month of June would also apply to the 24th of May 1912.

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PAUL RINGSETH, a witness called in behalf of defendant, being sworn, testified substantially as follows:

#### DIRECT EXAMINATION.

(By Mr McGowan).

(Witness): I remember the day that I swore the attachment out in the case of myself vs. Sam Vlik & Co. I gave the writ of attachment and the other papers that the commissioner gave me to Lysle Brown, the deputy marshal. Of my own knowledge he went down to serve them papers. I went down to the Sam Vlik & Co. lay the next morning. I seen the notices posted. I think it was on a post or a mast or something. Also two notices right on the end of

the wood pile. I didn't see Mr Pavlovich, the plaintiff in this case there on that day: I don't know where he was. I judge I went down there about ten o'clock in the morning and stayed quite a little while there that day. In the presence of the marshal and the commissioner I was appointed custodian. Sam Weiss, the commissioner, appointed me. Mr Brown, Mr Weiss, and me were there together when it was talked over and I was appointed by either Mr Brown or Mr Weiss, I can't remember now. After this conversation and on the next morning about ten o'clock I went down there and we talked over what to do. I stayed on this ground probably half an hour, sizing things up, sizing up the wood pile, the tools, and anything that was there belonging to the laymen. I don't remember reading the whole of the notice that the marshal put up there, but I read part of it. By these notices I seen that the property of Sam Vlik & Co. was attached. Wood and utensils and grub, and a tent, I think. The number of cords referred to was 200 cords more or less, I think. That was in the notice on that day as far as I can recollect. I stayed there two or three hours. Mr McLean was there at that time; when I went away I left McLean there on the ground. We were talking about the property, the wood, taking fire, or somebody putting fire to it, and I told him to see that it didn't catch fire. I left McLean there. I stayed there two or three hours, and as far I know he stayed there afterwards. I know he was there everyday. I know McLean was there every day for



ten or twelve days afterwards, because I went down there myself every day. I went down to that claim on the Sam Vlik lease every day after the attachment for about ten or twelve days afterwards, I just went down to see how things were going on. My store, I should think, is about 1500 ft. or something like that from the Sam Vlik lay. I can see this woodpile from the town of Chatanika, where my store is. I think I can see it from a point about 50 ft. from my store. I know I seen the woodpile every day and probably several times a day after the attachment was put on. On the 24th of May 1912 I was on the Sam Vlik lease; that was the day the judgment was rendered. I was also there on the 25th of May. I didn't see Mr Pavlovich, the plaintiff, on the ground on either one of those days. Mr McLean was on the ground and a fellow named O'Brien, he was mining there, and there were several men working on the claim for wages under my direction for eight or ten days. I am not positive whether those men were still there on the 24th and 25th of May, but I know there were some men there then. I measured the wood on the day of the marshal's sale, the 6th of June; there was 160 or 161 cords. There is a dispute as to one cord in the measurement. Mr McLean and Mr Carlson measured the wood and when we got through there was a little dispute between the three of us about one cord; I claimed that it was a little bit less than they had it. On the 18th of May, after the attachment was made, there was probably a couple of

cords more than when we measured. Mr McLean used them in the boiler on that lay under my directions. On the day the attachment was levied, so far as I know, there was between 100 and 163 cords on the ground. I am familiar with the market value of wood in that vicinity on the 24th of May 1912, also during the entire month of June 1912. There could not be any difference in the market value between those times. The market value of wood of this character was \$8.75 or \$9.00 at the most. I bought all that wood at the execution sale. On the 18th of May 1912 I didn't see the plaintiff, Mr Pavlovich, on the Sam Vlik lay. I saw Mr Pavlovich for the first time on the day of the marshal's sale, the sixth of June. There were two marshal's sales; the first was on the 6th of June, at which time 123 cords of wood was sold; the next sale was eight or ten days later and was in the McLean suit; the first sale was in my suit. At the second sale about 40 cords of wood were sold, which was bought by me; I bought the wood at both sales. There were other persons present at both sales, at the first sale there was quite a few present, eight or ten men, at the second there was not so many, four or five. The first time I saw Pavlovich was at the first sale; to my knowledge he was not present at the second sale. When I went to the Sam Vlik lay on the 19th of May I saw some notices there; I didn't pay much attention to them. Those notices were not there on the day before, on the 18th, when I was there. I know of a small pile of wood there; it is a bunch



of wood and timbers right close to the dump box, and lying in another direction from this wood altogether (meaning the wood in controversy), and I never saw any notices of any kind or description up on that pile. There was a bunch of 16 inch fire wood, close to the boiler house. I understood it had been piled up for the mess house. There was a couple of cords in that pile and no notice on it.

### CROSS EXAMINATION.

(By Mr Stevens).

(The Witness): Between the 18th of May and the 25th of May I resided at my store at Chatanika and I slept at the store.

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### DEFENDANT RESTS.

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PETER VIDOVICH, a witness called in behalf of plaintiff in rebuttal, being sworn, testified substantially as follows:

### DIRECT EXAMINATION.

(By Mr Stevens.)

(Witness): My name is Peter Vidovich and I am acquainted with the plaintiff in this case.

Q. Mr Vidovich, do you remember being in judge Day's office some time this last summer of 1912, wherein judge Day was present and Mr Brown, the deputy marshal, was present, and you were talking about this particular case and the attachment of the wood in the Ringseth case and in the McLean case, against Sam Vlik & Co.?

A. I was, yes sir.

Q. When I say Mr Brown, I mean the deputy that made the levy under the attachment; you know Mr Brown?

A. I do.

Q. I will ask you to state, Mr Vidovich, whether at that time and place, and in the presence of you and Mr Brown and Mr Day, that Mr Brown, referring to this matter, stated to you and Mr Day in substance as follows: That you were talking about this attachment, and that Mr Brown stated to judge Day and to you in substance that he, Brown, only attached the 3 or 3½ cords of wood, and that was the small pile; and that was where he, Brown, placed his notices of attachment,—on the small pile; and that that small pile was all the wood that he, Brown, attached?

(Mr Clark): We object as the proper foundation has not been laid, as to the time and place or as to the conversation.

(The Court): Objection overruled.

Ex. 8—(Defendant excepts; exception allowed).

Q. (Mr Stevens): You may answer that question as to whether Mr Brown said that, that day in the presence of judge Day, in substance as I have asked the question.

A. Yes sir.

Q. He did?

A. He did,

Q. Didn't Mr Brown say to you, or to judge Day in your presence at that time, that, when this case came to trial that he would go on the witness stand



and swear to that, that only 3½ cords of wood were attached by him?

(Mr McGowan): We object to that on the ground that the proper foundation has not been laid, as to the time or place or persons present.

(The Court): Objection overruled.

(Ex. 9—(Defendants except; exception allowed.)

A. He did say so.

### CROSS EXAMINATION.

(By Mr McGowan).

(Witness): All this conversation was at one time; I had just one conversation on the 21st of May at Mr Day's office, and that is the only conversation that I had with Mr Brown about this. This conversation lasted probably four or five minutes. I found Mr Brown in Mr Day's office when I went in there; Mr Day sent for me to come up there; they called me. Mr Day sent for me, because Mr Pavlovich asked for me to be interpreter. I am not interested in this case; I am not financing it; I only translated to Mr Pavlovich; I have no interest in the matter at all. I am sure this transaction took place on the 21st of May. Notices were not spoken about at all. I first heard about this trouble when Mr Pavlovich came to me at the "Fairbanks" corner, between 12 o'clock and 1 o'clock on the 19th of May, and he wanted me to come with him to see the judge of the court.

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H. A. DAY, a witness called for the plaintiff in rebuttal, being sworn, testified substantially as follows:

# DIRECT EXAMINATION.

(By Mr Stevens): Q. Mr Day, you may state to the jury whether or not, on the 19th day of May 1912, you, in company with Mr Peter Vidovich, went to the United States marshal's office in Fairbanks, Alaska, and then and there had a conversation with Mr Carlson, the deputy United States marshal, concerning the suit and the attachment therein, in the case of Paul Ringseth against Sam Vlik & Co., in the commissioner's court at Chatanika, before Sam Weiss, justice of the peace.

(Mr Clark): We object as irrelevant, incompetent, and immaterial, and not binding on defendants.

(The Court): Overruled.

Ex. 10.—(Defendant excepts; exception allowed).

A. Yes, we were there, I wouldn't swear to the date positively, but it was about that time.

Q. Mr Day, I will ask you whether or not, in the presence of you and Mr Peter Vidovich only, that Mr Brown, United States deputy marshal, at that time in your office, some time during the summer on the date which he testified to, when you were talking about this particular case of Paul Ringseth vs. Sam Vlik & Co. and the attachment thereunder sued out in the case before commissioner Weiss of Chatanika in the Fairbanks Precinct, whether or not Mr Brown said to you in substance that he, Brown, only attached 3 or 3½ cords of wood under this attachment, and that that was the small pile of wood, and that that was the place,—on the small pile of



wood,—where he, Brown, posted the notice of attachment, and that that was all the wood that he, Brown, attached in that suit. I will ask you whether or not that was the substance of what Mr Brown said to you and Mr Vidovich at that time and place.

(Mr Clark): We object to that, as no proper foundation has been laid.

(The Court): Overruled.

Ex. 11.—(Defendant excepts; exception allowed.)

A. He stated substantially that.

Q. (Mr Stevens): I will ask you to state whether or not, at the same place, he stated to you in the presence of Peter Vidovich, that he would so testify at the trial of this case, in substance.

(Mr Clark): Same objection.

(Objection overruled; defendants except; exception allowed.)

A. He most certainly did.

### CROSS EXAMINATION.

(By Mr McGowan).

(Witness): I am the attorney for the plaintiff in this case and was the only attorney of record until the trial commenced. I took this case under a contingent arrangement with the plaintiff and have an interest in the financial outcome of this case. I don't remember whether I called Mr Brown to my office or not. I am not sure that I telephoned Mr Vidovich to come up to listen to the conversation with Mr Brown. I know that I had the two of them there together. I think Mr Vidovich was in my office longer than four or five minutes, and I think

he took part in the conversation. I am not positive. I believe he went away and left Brown there with me. I can not state the date on which this conversation took place. I believe I heard about this trouble before the 18th of May. Mr Pavlovich hadn't telephoned to me but I might have heard those things before; I might have heard of these troubles in the Sam Vlik attachment on the street or anywhere else.

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### TESTIMONY CLOSED.

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### DEFENDANT'S MOTION FOR INSTRUCTED VERDICT.

(Mr Clark): We move the Court at this time to instruct the jury in this case to bring in a verdict against the plaintiff and in favor of the defendant upon the grounds: First, That the plaintiff has failed to prove his case as alleged in his complaint. Second: That it appears from the evidence in this case that the alleged bill of sale, relied upon by the plaintiff in this case as the foundation of his case, is nothing more or less than a chattel mortgage, which is void under the law of Alaska, in that: 1st, it was not executed with the formalities required to constitute a valid chattel mortgage where the possession did not change; and 2nd, on the ground that no possession of the property, no actual change of possession of the property, ever took place after the chattel mortgage was given. Further, that it appears conclusively from the testimony—and there is no



conflict in the testimony,—that the property in controversy was in the possession of the United States marshal at the time that the plaintiff in this case alleges he was put in possession of the property or went into possession of the property. Further, it is alleged in the complaint, and is the very basis of their complaint, that, on the 24th day of May 1912, and for a long time prior thereto, plaintiff was the owner and in the actual possession of the property described in the complaint; and it conclusively appears from the evidence that he was not in possession of the property on the 24th, and had not been in possession of the property prior thereto at any time, but that, on the contrary, it was in the possession of the marshal; and granting, for the sake of the motion, that the lien of the Ringseth attachment was lost when he failed to have it foreclosed in the judgment, that plaintiff never went into possession after that lien was lost, never made any attempt to go into possession, and never was in possession of the property at any time, either actively or constructively, before the commencement of this suit, or at any time after he had delivered it to Sam Vlik & Co.

(The Court): According to the view I take of it, I think those are the questions to be submitted to the jury. I will reserve my decision on the motion until I hear what you have to say on instructions. If you have any instructions you may present them now.

(The Court): There was a motion for directed verdict submitted by defendants; that may be denied.

Ex. 12.—(Mr. McGowan): We save an exception.

(Exception allowed.)

Thereupon the defendant requested certain instructions, numbered I to XVII inclusive, part of which were given and the remainder of which were refused; to which refusals the defendant then and there excepted, as is more fully shown by his exceptions numbered 1 to 14 inclusive; and thereupon the Court instructed the jury, as is more fully shown by the instructions hereinafter set out, numbered from I to XXVIII inclusive, to a part of which instructions the defendant thereupon excepted, as is shown by his exceptions thereto, numbered 1 to 9 inclusive, following the instructions of the Court; and all of which more fully appears from "Requested Instructions, Instructions, and Exceptions", duly served and filed on the 2nd day of May 1913, and which is in the words and figures following:

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[Title of Court and Cause.]

**Defendant's Requested Instructions to Jury.**

Now comes the defendant and requests the Court to instruct the Jury in the above entitled case as follows, to wit:

I.—You are instructed that the plaintiff in this case alleges that, on the 24th day of May 1912, and for a long time prior thereto, the plaintiff was the owner, and in the actual possession, and entitled to the possession, and still is the owner and entitled to the possession of the wood in controversy in this action, and that, on the 24th day of May 1912, the defendant unlawfully took said wood from the pos-



session of the plaintiff and converted it to his own use.

These allegations of the complaint are denied by the defendant in his answer, and this being so, it is incumbent on the plaintiff to prove, by a preponderance of the evidence that, on the 24th day of May 1912, and for a long time prior thereto, he was the owner, in the actual possession and entitled to the possession, and still is the owner and entitled to the possession of the wood in question; and if he does not establish his ownership, as above alleged, by a preponderance of the evidence, then your verdict must be for the defendant.

II.--You are instructed that it is admitted by the pleadings that the actions of Ringseth vs. Sam Vlik & Co., and McLean vs. Sam Vlik & Co., were commenced on the 17th day of May 1912, and that such proceedings were had in both said actions that attachments were issued and delivered to the United States Marshal for service, and that the summons and writ of attachment in both said actions were served by one of the deputies of the defendant prior to the execution of the bill of sale offered in evidence in this case, wherein it is claimed by the plaintiff that the wood in controversy was sold to the plaintiff.

It is contended by the defendant in this action that the alleged bill of sale, given by Vlik & Co. to the plaintiff in this action on the 18th day of May 1912, was, in reality, a chattel mortgage; and if you find from the evidence that said alleged bill of sale was not a bill of sale, but was intended as, and is, a chattel

mortgage, then you are instructed that, under the laws of Alaska, a mortgage of personal property is void, as against the creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith for value, unless: (1) the possession of such property be delivered to and retained by the mortgagee, or (2) the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, to the effect that the same is made in good faith, to secure the amount named therein, and without any design to hinder, delay, or defraud creditors, and be acknowledged and filed in the office of the Recorder of the precinct in which the property is situate, and be indexed in the record of chattel mortgages, and the original thereof retained by the said Recorder for the examination of all persons who may be interested therein.

III.—I instruct you that the possession of said mortgaged property, as meant by the foregoing provisions, is an actual possession thereof, adverse to all the world save said mortgagee. And if you find, from the evidence in this case, that the bill of sale offered by the plaintiff was intended as a chattel mortgage, then I instruct you that said mortgage is void as to attaching creditors in good faith for value, unless the plaintiff in this action entered into the actual possession of said property described in said alleged bill of sale and retained possession thereof. (Modified by the Court by the addition of the words: "Or was prevented from so doing by the possession or



acts of the defendant.”)

IV.—I instruct you that, if you find that said alleged bill of sale, offered by the plaintiff in this case, was, in reality, intended as a chattel mortgage, and was not filed and indexed as such in the office of the Recorder, as required by law, then said mortgage is void and of no effect.

V.—I instruct you that possession of personal property can not be in two persons at the same time whose interests are in conflict with each other, and, if you find from the evidence that the defendant in this action was in possession of the wood described in plaintiff’s complaint, from the 17th day of May 1912 up to and including the 24th day of May 1912, then the plaintiff in this action was not, and could not be, in possession of said property or any part thereof, as alleged in his complaint.

VI.—I instruct you that, in order for the plaintiff in this action to have acquired possession of the wood in controversy, after the entry of the judgments in the cases of Ringseth vs. Vlik & Co., and McLean vs. Vlik & Co., on the 24th day of May 1912, it was necessary for him to take such actual possession thereof as would be notice to the world, and to this defendant in particular, that he was claiming and asserting a claim thereto, and, if you find that the plaintiff did not take such possession, between the time of the rendition of such judgments on the 24th day of May 1912, and prior to the levy of the execution issued out of the Commissioner’s Court at Chatanika, in the cases above men-

tioned, then the lien of said judgments, acquired by the levy of such executions, is paramount and superior to any possession claimed by the plaintiff in this action, and the United States Marshal had the right to sell the property under the writs of execution in those cases.

VII.—You are instructed that, if at the time when the defendant levied the executions above mentioned, on the wood in controversy herein, the plaintiff herein was not in the actual possession of said wood, then the levy on said executions was properly made, and the defendant was entitled to hold said property thereunder.

VIII.—You are instructed that any transfer of property by an insolvent debtor, while litigation is pending or while he is in failing circumstances, whereby he attempts to prefer any given creditor, is a badge of fraud, and should be considered by you in determining whether or not said alleged bill of sale from Vlik & Co. to the plaintiff was made in good faith; and if you believe, from the evidence in this case, that the alleged bill of sale, offered by the plaintiff, was made by Sam Vlik & Co. to the plaintiff with the understanding that the same was made for the purpose of protecting the plaintiff, as against other creditors of Sam Vlik & Co., then I instruct you that the said transfer was fraudulent as against the plaintiffs in said actions, namely, as against Paul Ringseth and Jack McLean, and if you so find, then your verdict in this action should be for the defendant.



IX.—You are further instructed that every conveyance or assignment in writing, or otherwise, of any interest in lands or things in action, or any rents or profits issuing therefrom, and every charge on lands, goods, or things in action, or on the rents or profits thereof, made by any person with intent to hinder, delay, or defraud creditors, or other persons, of their lawful suits, demands, debts, or damages, as against the persons so hindered, delayed, or defrauded, is void, and if you find, from the evidence in this case, that Sam Vlik & Co. executed the bill of sale produced by plaintiff in this action with such intent, then your verdict should be for the defendant.

X.—You are further instructed that, if you find, from the evidence in this case, that the defendant was in the lawful possession of the wood in controversy, under and by virtue of the writs of attachment mentioned herein, from the 17th day of May 1912 up to and including the 24th day of May 1912, then, even though the attachment may have expired by operation of law, the possession was that of the defendant until said date, and if the plaintiff did not either enter into possession or take possession of said wood on or before the 25th day of May 1912, when the execution in the case of Ringseth vs. Vlik & Co. was levied, then the wood in controversy was in the legal possession of the United States Marshal, as alleged in defendant's answer herein.

XI.—You are also instructed that the judgments in the cases of Ringseth vs. Sam Vlik & Co and McLean vs. Sam Vlik & Co. are valid judgments for the pur-

poses of this case, and are binding on the plaintiff, and that the executions issued thereunder and said judgments kept in force the attachments in said actions, and the property levied on thereunder was at all times subject to the executions issued in said actions, and the plaintiff in said actions, by virtue of said attachments, had valid liens on the wood in controversy from the 18th day of May 1912 until the time when the said property was sold under the executions issued therein.

XII.—You are instructed that the attachment liens of Ringseth vs. Vlik & Co. and McLean vs. Vlik & Co. were not lost, destroyed, waived, or abandoned by the plaintiff in said actions, by reason of the failure of the Commissioner, in whose Court said actions were pending, to insert in said judgments an order foreclosing said liens, and that the words "Let execution issue" were a sufficient order of foreclosure.

XIII.—You are instructed that the defendant, in his answer, alleges that Sam Vlik & Co. were indebted to Paul Ringseth and to Jack McLean in large sums of money, and that, on or about the 18th day of May 1912, the said Vlik & Co., with intent to hinder, delay, and defraud their creditors, and particularly the said Ringseth and the said McLean, made and executed a conveyance or bill of sale, wherein and whereby they attempted to sell to the plaintiff herein the wood in controversy in this action, for a fictitious consideration of two thousand dollars, with the design thereby to defraud the said Ringseth and the said McLean of their lawful claims,



demands, and suits, and that said bill of sale was made with the sole purpose and design of hindering, delaying, and defrauding the creditors of said Vlik & Co, and particularly said Ringseth and said McLean, and that the plaintiff did not enter into possession of said wood at any time; and if you find that the evidence in this case sustains these allegations, (Modified by the Court by addition of the words: "And if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Co.") then your verdict should be for the defendant.

XIV.—You are instructed that, if you find from the evidence that said alleged bill of sale, given to the plaintiff in this action on the 18th day of May 1912, was in reality a chattel mortgage, and that said plaintiff actually took possession of said property under said chattel mortgage, and actually held possession thereof, when said property was taken under the executions by the defendant in this action, in the case of Ringseth vs. Vlik & Co. and McLean vs. Vlik & Co., you can not, under any circumstances, find a verdict in favor of the plaintiff in this action for a greater sum than the amount of the indebtedness which said alleged mortgage was given to secure; and, if you find the foregoing facts to be true, you can not, under any consideration, find for said plaintiff in a sum greater than the actual market value of the wood so seized by the defendant, as proved by the evidence in this case.

XV.—You are further instructed that, if you find,

from the evidence in this case, that the bill of sale produced in evidence by the plaintiff was given with the intent to hinder, delay, or defraud said Paul Ringseth and said Jack McLean, or either of them, in the collection of their just debts and demands, then your verdict must be for the defendant.

XVI.—You are further instructed that the evidence in this case conclusively shows that Paul Ringseth and Jack McLean are judgment creditors of Sam Vlik & Co., and that, if the bill of sale offered by the plaintiff was made for the purpose of hindering and delaying them in the collection of their just debts and demands, then your verdict must be in favor of the defendant.

XVII.—You are instructed that, if you should find, from the evidence, that the possession of the defendant under the attachment liens above referred to was lost by the failure of the defendant to have the attachment foreclosed in the judgments above mentioned, and that thereafter the defendant acquired a valid lien under the executions hereinbefore mentioned, then his possession, so obtained, would be valid, unless the plaintiff had actual possession and control of said personal property.

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Ex. 13.—1. The Court erred in refusing to give that part of requested instruction No. II, beginning with the words "Or (2) the mortgage", and the remainder of said instruction, to which ruling the defendant then and there excepted.



Ex. 14.—2. The Court erred in modifying requested instruction No. III, by adding at the end thereof the words: "Or was prevented from so doing by the possession or acts of the defendant", to which modification defendant then and there excepted.

Ex. 15.—3. The Court erred in refusing to give to the Jury requested instruction No. IV, to which ruling the defendant then and there excepted.

Ex. 16.—4. The Court erred in refusing to give to the Jury requested instruction No. VI, to which ruling the defendant then and there excepted.

Ex. 17.—5. The Court erred in refusing to give to the Jury requested instruction No. VII, to which ruling the defendant then and there excepted.

Ex. 18.—6. The Court erred in refusing to give to the Jury that portion of requested instruction No. VIII which reads as follows: "And if you believe, from the evidence in this case, that the alleged bill of sale, offered by the plaintiff, was made by Sam Vlik & Co. to the plaintiff with the understanding that the same was made for the purpose of protecting the plaintiff, as against other creditors of Sam Vlik & Co., then I instruct you that the said transfer was fraudulent as against the plaintiffs in said actions, namely, as against Paul Ringseth and Jack McLean, and, if you so find, then your verdict in this action should be for the defendant," to which ruling the defendant then and there excepted.

Ex. 19.—7. The Court erred in refusing to give to the Jury requested instruction No. IX, to which ruling the defendant then and there excepted.

Ex. 20.—8. The Court erred in refusing to give to the Jury requested instruction No. X, to which ruling the defendant then and there excepted.

Ex. 21.—9. The Court erred in refusing to give to the Jury requested instruction No. XI, to which ruling the defendant then and there excepted.

Ex. 22.—10.—The Court erred in refusing to give to the Jury requested instruction No. XII, to which ruling the defendant then and there excepted.

Ex. 23.—11. The Court erred in modifying requested instruction No. XIII, by inserting the words: "And if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Co.", to which modification the defendant then and there excepted.

Ex. 24.—12. The Court erred in refusing to give to the Jury requested instruction No. XIV, to which ruling the defendant then and there excepted.

Ex. 25.—13. The Court erred in refusing to give to the Jury requested instruction No. XVI, to which ruling the defendant then and there excepted.

Ex. 26.—14. The Court erred in refusing to give to the Jury requested instruction No. XVII, to which ruling the defendant then and there excepted.

The Court thereupon instructed the Jury as follows:

I.

Gentlemen of the Jury:

The plaintiff in this case in his complaint alleges that on and prior to May 24th, 1912, he was the owner and in the actual possession and entitled to



the possession and still is the owner and entitled to the possession of one hundred and ninety three cords of four foot birch wood on Discovery claim on the Chatanika Flats, in this precinct, worth twelve dollars per cord; that on said day the defendant unlawfully converted the same to his use, to plaintiff's damage in the sum of twenty six hundred and sixteen dollars.

## II.

These allegations are denied by the defendant in his answer.

## III.

And it is therefore incumbent upon the plaintiff to prove by a preponderance of the evidence the material allegations of the complaint, that is, that on or about the date alleged he was such owner and entitled to the possession of the wood in question.

## IV.

Unless such allegations are so established, then your verdict should be for the defendant.

## V.

The defendant also alleges in his answer, the right to the possession by virtue of certain attachments, and levies under said attachments, and writs of execution issued in two cases pending in the Commissioner's Court at Chatanika.

## VI.

You are instructed that it is admitted by the pleadings that the action of Ringseth vs. Sam Vlik & Company, and McLean vs. Sam Vlik & Company were commenced on the 17th day of May 1912, and

that such proceedings were had in both said actions that attachments were issued and delivered to the United States Marshal for service, and summonses and writs of attachment in both actions were served by one of the deputies of the defendant prior to the execution of the bill of sale offered in evidence in this action wherein it is claimed by the plaintiff that the wood in controversy was sold to the plaintiff.

### VII.

It is contended by the defendant in this action that this alleged bill of sale given by Vlik & Company to plaintiff in this action on the 18th day of May, 1912, was in reality a chattel mortgage. And, if you find from the evidence that said bill of sale was not a bill of sale but was executed as and is a chattel mortgage, then you are instructed that under the laws of Alaska a mortgage of personal property is void as against the creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value, unless the possession of the property be delivered to and retained by the mortgagee, or the mortgage be executed with certain formalities required by law—which it is not contended was done in this case.

### VIII.

I instruct you that the possession of such mortgaged property as meant by the foregoing provision is an actual possession thereof adverse to all the world save the mortgagee.

### IX.

And, if you find from the evidence in this case



that the bill of sale offered by the plaintiff was intended as a chattel mortgage, then I instruct you that the said mortgage is void as to prior creditors in good faith for value, unless the plaintiff in the action entered into the actual possession of such property and retained possession thereof, or unless you find that he was prevented from so doing by the possession or acts of the defendant.

X.

I instruct you that possession of personal property can not be in two persons at the same time whose interests are in conflict with each other. And if you find from the evidence that the defendant in this action was in possession of the wood described in plaintiff's complaint on the 17th day of May 1912, then the plaintiff in this action was not and could not be in possession of the property as alleged in his complaint.

XI.

You are instructed that where absolute ownership is claimed and only special property in the thing claimed is shown—as would be the case if the plaintiff instead of showing absolute ownership should show a conditional sale, or this bill of sale operated as a chattel mortgage—that that is sufficient to sustain a recovery provided that it also appear that the plaintiff has the right of immediate possession of the property.

XII.

You are instructed that property may be sold or mortgaged subject to the lien of an attachment, and

the sale or mortgage becomes absolute when the lien of the attachment is removed or lost.

### XIII.

You are instructed that the judgments given in the Commissioner's Court at Chatanika on May 24, 1912, that have been introduced in evidence in this case, did not contain any order that the property attached theretofore in the actions in which said judgments were given should be sold to satisfy the demands of the plaintiffs in said actions, and that therefore as a matter of law said plaintiffs waived and lost any lien theretofore secured upon the property in question by reason of the attachments theretofore issued in said actions, and that the defendant was not therefore longer entitled to the possession of said property under said writs of attachment, if you should find that they had been theretofore duly levied.

### XIV.

And you are further instructed that if you find that the plaintiff had become the owner of said wood and entitled to the immediate possession thereof prior to the date of the levy thereon by the defendant under the writs of execution (evidence of which has been given before you) by reason of the bill of sale to the plaintiff from Sam Vlik & Company, then the defendant was without right to hold such property inder such levies, or to sell or dispose of the same.

### XV.

You are instructed that if you find by a prepon-



derance of evidence that on May 18th, 1912, Sam Vlik & Company was indebted to the plaintiff in the sum of seventeen hundred and twenty dollars, or any other substantial sum, and, that in consideration of such indebtedness, and without intent to hinder, delay, or defraud the creditors of said Vlik & Company, or without previous knowledge of such intent on the part of the plaintiff, then executed and delivered to the plaintiff the bill of sale of said property; and, if you further find by a preponderance of evidence that the plaintiff thereupon acquired the right to the immediate possession of said property, and that plaintiff did on or about May 18, or at any time before the levy of the executions herein mentioned, take possession of said wood, or notify the defendant of his claim of ownership and right of possession thereof, or that the defendant was otherwise notified of such ownership and right of possession, then you are instructed that the levy or attempted levy under such writs of execution was without authority, and that the defendant did not thereby secure any right to hold such wood under such levy, or to sell the same thereunder.

## XVI.

You are instructed that every conveyance or assignment in writing or otherwise of any goods or personal property, or any estate or interest therein, made with the intent to hinder, delay or defraud creditors of their lawful suits, demands or debts, as against persons so hindered, delayed or defrauded are void; also that all conveyances and transfers of

assignment, either verbal or written, of goods and chattels made in trust for the person making the same are void against creditors, existing or subsequent, of such person. And you are therefore instructed that if you find that the bill of sale given on May 18th, 1912, by Vlik & Company to the plaintiff was made with the intent on the part of said Vlik & Company to hinder, delay or defraud either said Ringseth or said McLean of their lawful suits, demands, or debts, or if you shall find that such bill of sale was made in trust for the said Vlik & Company then such bill of sale is void as against the defendant, provided that you further find that the plaintiff had previous knowledge of the fraudulent intent of said Vlik & Co.

#### XVII.

You are further instructed that the question of fraudulent intent is a question of fact to be decided by you from all the evidence given in this case.

#### XVIII.

You are instructed that any transfer of property by an insolvent debtor, made while litigation is pending or while he is in failing circumstances, whereby he attempts a preference among ordinary creditors is a badge of fraud, and may be considered by you in determining whether or not the alleged bill of sale from Vlik & Company to the plaintiff was made in good faith.

#### XIX.

You are instructed that in his answer the defendant alleges that Sam Vlik & Company were indebted



to Paul Ringseth and to Jack McLean in large sums of money, and that on or about the 18th day of May 1912, the said Vlik & Company, with intent to hinder, delay and defraud their creditors, and particularly the said Ringseth and the said McLean, made and executed a conveyance or bill of sale to the plaintiff whereby they attempted to sell to the plaintiff all of the wood in controversy in this case for a fictitious consideration of two thousand dollars, with the design thereby to defraud the said Ringseth and the said McLean of their lawful claims, demands and suits, and that said bill of sale was made with the sole purpose and design of hindering, delaying and defrauding the creditors of said Sam Vlik & Company and particularly the said Ringseth and said McLean, and that the plaintiff did not enter into possession of said wood at any time; and if you find that the evidence in this case sustains these allegations, and if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Company, then your verdict should be for the defendant.

## XX.

You are instructed that if you find from the evidence that said alleged bill of sale given to plaintiff in this action on the 18th day of May 1912, was in reality a chattel mortgage, and that the plaintiff actually took possession of the property under said chattel mortgage and actually held possession thereof when said property was taken under execution by the defendant in this action in the case of Paul Ringseth

vs. Sam Vlik and Company and Jack McLean vs. Sam Vlik & Company, you can not under such circumstances find a verdict in favor of the plaintiff in this action for a greater sum than the amount which said alleged mortgage was given to secure; and, if you find the foregoing facts to be true, you can not under any circumstances find for the plaintiff in a sum greater than the actual market value of the wood so seized by defendant at the time and place of such seizure as proved by the evidence in this case.

### XXI.

You are instructed that you are the sole judges of all questions of fact, and of the effect of evidence, and the weight to be given to the testimony of the witnesses, but your power in this respect is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence laid down in these instructions.

### XXII.

In considering the evidence in this case, you are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses when their evidence does not bring conviction to your minds, against a lesser number of witnesses or against a presumption or other evidence which is satisfying to your minds.

### XXIII.

A witness willfully false in one part of his testimony may be distrusted in others.

### XXIV.

Taht in determining the credit you will give to a



witness, and the weight and value you will attach to his testimony, you should take into consideration the demeanor and appearance of the witness up on the stand, the interest he has (if any) in the result of the trial, the motive he has in testifying (if any is shown), his relations to or feeling for or against any of the parties to the case, the probability or improbability of such witness' statements, the opportunity he had to observe and to be informed as to the matters in respect to which he gave testimony before you, and the inclination he evinces, in your judgment, to tell the truth or otherwise as to the matters within his knowledge.

#### XXV.

It is your duty to give to the testimony of each and all of the witnesses appearing before you such credit as you consider they are justly entitled to receive.

#### XXVI.

In this case you are instructed that the evidence is to be estimated, not only by its intrinsic weight, but also by the evidence which it is within the power of one side to produce and of the other to contradict, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party offering the same, then the evidence so offered should be viewed with distrust.

#### XXVIII.

You are instructed that you should consider no evidence sought to be introduced, but excluded by the

Court, nor should you consider any evidence stricken from the record by the Court, nor should you take into consideration in making up your verdict any knowledge or information known to you not derived from the evidence given by the witnesses on the witness stand.

Whatever verdict is warranted by the evidence, under the instructions of the Court, you should return, as you have sworn so to do.

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### EXCEPTIONS TO CHARGE.

Ex. 27.—1. The Court erred in giving to the Jury instruction No. IX as hereinabove set forth, to which ruling the defendant then and there excepted.

Ex. 28.—2. The Court erred in giving to the Jury instruction No. XI as hereinabove set forth, to which ruling the defendant then and there excepted.

29.—3. The Court erred in giving to the Jury instruction No. XII as hereinabove set forth, to which ruling the defendant then and there excepted.

30.—4. The Court erred in giving to the Jury instruction No. XIII as hereinabove set forth, to which ruling the defendant then and there excepted.

31.—5. The Court erred in giving to the Jury instruction No. XIV as hereinabove set forth, to which ruling the defendant then and there excepted.

32.—6. The Court erred in giving to the Jury instruction No. XV as hereinabove set forth, to which ruling the defendant then and there excepted.

33.—7. The Court erred in giving to the Jury that part of instruction No. XVI reading as follows:



"Provided that you further find that the plaintiff had previous knowledge of the fraudulent intent of said Vlik & Company." To which the defendant then and there excepted.

34.—8. The Court erred in giving to the Jury that part of instruction XIX reading as follows: "And if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Company." To which the defendant then and there excepted.

35.—9. The Court erred in giving to the Jury instruction No. XX as hereinabove set forth, to which ruling the defendant then and there excepted.

Settled and allowed within the time prescribed by law.

F. E. FULLER,

Judge.

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Thereupon the case was submitted to the jury, who retired for deliberation, and thereafter returned their verdict, which was in the words and figures following:

[Title of Court and Cause.]

**Verdict.**

We, the jury duly empaneled and sworn to try the issues in the above entitled cause, find the issues for the plaintiff, and assess the damages to be the sum of thirteen hundred and twenty five dollars \$1325.00.

Dated at Fairbanks, Alaska, this 29 day of April, 1913.

FOREMAN

H. E. StGeorge.

Entered in Court Journal No. 12, page 53.

(Indorsed: Filed in the District Court, Territory of Alaska, 4th Div., Apr. 29, 1913. C. C. Page, Clerk.)

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Thereupon, and within the time allowed by law, the defendant duly served and filed his motion for a new trial herein, which was in the words and figures following:

[Title of Court and Cause.]

**Motion for a New Trial.**

Now comes the defendant in the above entitled action and moves for an order setting aside the verdict of the jury, returned and filed in this action, on the twenty ninth day of April, A. D. one thousand nine hundred thirteen, and that a new trial of said action be granted on the following grounds, to wit:

(1) Insufficiency of the evidence to justify the verdict and that the same is against law;

(2) Errors in law occurring at the trial and excepted to by the defendant.

This motion will be made on the pleadings, the verdict and records of this Court in this action, and the testimony adduced at the trial, as it appears from the stenographer's notes, and the defendant will rely on all exceptions taken by him to the rulings of the Court made during the progress of the trial, as it appears from said stenographer's notes, and also on the exceptions taken to the Court's rulings in refusing to charge the jury as requested by the defendant, as well as the exceptions made to the parts of the Court's instructions as given, which excep-



tions as to the rulings of the Court in refusing instructions and as to the portions of its charge more fully appear from the "Request to instruct, Instructions, and Exceptions", served and filed herein.

That the evidence is insufficient to justify the verdict in this that:

(a) The evidence fails to show that the plaintiff was the owner of, or entitled to the possession of the wood, as alleged in plaintiff's complaint;

(b) The evidence shows that the alleged bill of sale, under which the plaintiff claimed, was a fraudulent transfer, made for the purpose of hindering, delaying, and defrauding creditors, and was, therefore, ineffectual as against defendant;

(c) The evidence shows that the defendant was in the actual possession of the wood alleged in the complaint, under due and valid process of law, and retained possession thereof from a date prior to the date of the alleged bill of sale above mentioned to plaintiff, and continuously held possession thereof until the same was sold under said process;

(d) The evidence shows that the plaintiff never either actually or constructively entered into possession of the wood alleged in the complaint, but on the contrary the possession thereof was held adversely to him by the defendant at all times from the initial levy thereon, prior to the execution of said alleged bill of sale, until said wood was sold under due process of law;

(e) The evidence shows that the alleged bill of sale held by plaintiff was without valuable considera-

tion, or other consideration; that the same was not made in good faith, but was fraudulent as against defendant and the existing creditors of Sam Vlik & Co.;

(f) The evidence shows that Paul Ringseth and Jack McLean were, bona fide, existing creditors of Sam Vlik & Co., long prior to the execution of the alleged bill of sale relied on by plaintiff, and that the same was executed by Sam Vlik & Co. to plaintiff with intent to hinder, delay, and defraud them in the collection of their debts;

(g) The evidence shows that the verdict given by the jury in this case was rendered by said jury under the influence of passion and prejudice; was and is contrary to the evidence introduced in said cause; and is contrary to law.

Dated at Fairbanks, Alaska, this second day of May, A. D. one thousand nine hundred thirteen.

McGOWAN & CLARK,

Attorneys for Defendant.

(Indorsed: Filed in the District Court, Territory of Alaska, 4th Div., May 2, 1913. C. C. Page, Clerk. By H. C. Green, Deputy.)

Due service hereof admitted this May 2, 1913.

H. A. DAY, M. E. STEVENS,

Attorney for Plff.

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Thereupon the motion for a new trial came on regularly to be heard before the Court and on the 24th day of May 1913 the Court overruled said motion for a new trial, as more fully appears by the or-



der of said Court, which is as follows:

[Title of Court and Cause.]

**Order Overruling Motion for New Trial.**

This cause coming on regularly to be heard on this 24th day of May, 1913, on the defendants motion to set aside the verdict heretofore rendered herein and grant to said defendant a new trial of the issues in this case;

After hearing the argument of counsel and being fully advised in the premises, it is ordered by the Court that said motion be and the same is hereby denied, to which order defendant excepts and his exception is allowed.

Done in open Court this 24th day of May, 1913.

F. E. FULLER,

Judge.

Entered in Court Journal No. 12, page 603.

(Indorsed: Filed in the District Court, Territory of Alaska, 4th Div., May 24, 1913. C. C. Page, Clerk. By H. C. Green, Deputy.)

Thereafter and on the 24th day of May 1913 the Court made and entered its judgment on the verdict, which is as follows:

[Title of Court and Cause.]

**Judgment on Verdict.**

This action came on regularly for trial, the parties appearing by their attorneys Morton E. Stevens and H. A. Day for the plaintiff, and McGowan & Clark for the defendant. A jury of twelve persons was regularly empanelled and sworn to try said action.

Witnesses on the part of the plaintiff and defendant sworn and examined. After hearing the evidence and argument of counsel and instructions of the court the jury retired to consider their verdict and subsequently returned into court with the verdict signed by the foreman, and being called answered to their names and say:

"We the jury in this cause find for the plaintiff and assess his damages at Thirteen Hundred and Twenty-Five Dollars \$1,325.00)."

Wherefore by virtue of the law and by reason of the premises aforesaid it is ordered, adjudged and decreed that said plaintiff have and recover of and from said defendant the sum of Thirteen Hundred and Twenty-Five Dollars (\$1,325.00) and interest thereon at eight per cent. per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, taxed at \$.....

On application of the defendant a stay of execution herein for the period of ten days was granted by the Court.

Done in open Court this 24th day of May, 1913.

F. E. FULLER,  
Judge.

Entered in Court Journal No. 12, page 602.

(Indorsed: Filed in the District Court, Territory of Alaska, 4th Div., May 24, 1913. C. C. Page, Clerk. By H. C. Green, Deputy.)

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And now, in furtherance of justice and that right



may be done, the defendant in the above entitled action, within the time allowed by law and the orders of this Court extending his time within which to prepare, serve, and have settled his bill of exceptions in this cause, herewith presents the foregoing bill of exceptions in the above entitled cause and prays that the same may be settled and signed and allowed by the Judge of this Court, in the manner prescribed by law.

McGOWAN & CLARK

Attorneys for Defendant.

Due service hereof admitted this Oct. 16, 1913.

H. A. DAY, M. E. STEVENS,

Attorney for Plff.

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[Title of Court and Cause.]

The defendant having heretofore and within the time allowed by law and the orders extending time made by this Court, duly served and filed his proposed bill of exceptions in the above entitled matter, and plaintiff's time to file amendments thereto having expired on the twenty-seventh day of October, 1913, now, on account of the illness of Morton E. Stevens, Esq., one of plaintiff's counsel, it is consented that said plaintiff may have until and including the fifth day of November, 1913, within which to serve and file his proposed amendments to said bill of exceptions, and that the defendant's time to present, have settled, and file his bill of exceptions be extended for a period of ten days after the service of plaintiff's proposed amendments, and that further or-

ders of this Court in this connection shall not be necessary.

Dated at Fairbanks, Alaska, this 31st day of October, 1913.

H. A. DAY,

Attorney for Plaintiff.

McGOWAN & CLARK,

Attorneys for Defendant.

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**Order Allowing Bill of Exceptions.**

The defendant, by his attorneys Messrs McGowan & Clark, pursuant to notice heretofore duly served on the attorneys for the plaintiff, having, on the 11th day of November 1913, presented the foregoing bill of exceptions for settlement and allowance by the Court, in the manner prescribed by law, Morton E. Stevens, Esq., one of plaintiff's attorneys, appearing at said time, and it appearing to the Court, from the orders heretofore made and entered herein, and the stipulation of the attorneys for the respective parties hereto attached, that said bill of exceptions has been heretofore, and within due time, served on the attorneys for the plaintiff, and that the plaintiff has failed to serve or file any proposed amendments thereto, and that his time to serve and file amendments has expired, and that the foregoing bill of exceptions is true and correct in all particulars, and contains all the material testimony, evidence, and exhibits, and other proofs introduced by the respective parties during the hearing of said cause, and the Court being fully advised in the premises;



It is ordered that the foregoing bill of exceptions be, and the same is, hereby allowed, settled, approved, and signed as the bill of exceptions for use in said cause and is hereby made a part of the record, and that the same shall be the bill of exceptions to be used on appeal or writ of error in the above entitled cause.

It is further ordered that the clerk of this Court shall re-file said bill of exceptions as of this date.

Done in open Court at Fairbanks, Alaska, on this twelfth day of November, A. D. one thousand nine hundred thirteen.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 12, page 761.

(Bill of Exceptions Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Oct. 16, 1913. Angus McBride, Clerk. By C. C. Page, Deputy. Re-filed in the District Court, Territory of Alaska, 4th Div., Nov. 12, 1913. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Order Relative to Supersedeas and Cost Bond on  
Writ of Error.**

The defendant above named having on this day, in open Court, secured an order for additional time within which to file his bill of exceptions herein, and having announced that he intends to, and will, petition for and prosecute a writ of error from the verdict and judgment in this action made and entered, to the United States Circuit Court of Appeals for the

Ninth Circuit, at San Francisco, State of California, and having moved the Court for an order staying proceedings against the defendant pending the hearing of said writ of error, and that an order be made fixing the amount of the security which defendant shall be required to give and furnish to stay said proceedings and for costs on writ of error, and having asked that, on the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit, and said motion on this day having been granted by the Court,

Now, therefore, it is ordered that, on the defendant above named filing with the Clerk of this Court a good and sufficient bond in the sum of twenty five hundred dollars, to the effect, that if the said defendant and plaintiff in error shall prosecute his said writ of error to effect within the time allowed by law, and shall answer and pay all judgments, damages, and costs, if he shall fail to make good his said plea, then this obligation to be void, otherwise to remain in full force, effect, and virtue, which said bond shall be approved by the Clerk of this Court or any of his deputies, and all further proceedings in this Court in said cause shall be, and they are, hereby suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California;

It is further ordered that said bond in the sum of twenty five hundred dollars shall operate both as a



supersedeas bond and a bond on writ of error to answer damages and costs, the said amount having been fixed by the Court as sufficient to stay proceedings, for supersedeas, and as bond on writ of error.

Done in open court at Fairbanks, Alaska, this 29th day of May, 1913.

F. E. FULLER,  
District Judge.

Entered in Court Journal No. 12, page 646.

Due service hereof admitted this May 29, 1913. H. A. Day, Attorney for Plff. (Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., June 2, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy.

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[Title of Court and Cause.]

**Bond.**

KNOW ALL MEN BY THESE PRESENTS that we, H. K. Love, as United States Marshal, as principal, and J. D. Reagh and H. B. Parkin, as sureties, all of Fairbanks, Alaska, are held and firmly bound unto Vaso Pavlovich, the plaintiff herein, in the sum of twenty five hundred dollars, lawful money of the United States of America, to be paid to said Vaso Pavlovich, plaintiff aforesaid, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this sixth day of June, A. D. one thousand nine hundred thirteen.

Whereas lately, at a District Court for the Terri-

tory of Alaska, Fourth Judicial Division, holden at Fairbanks, Alaska, in a suit pending in said Court, between Vaso Pavlovich as plaintiff and H. K. Love as United States Marshal as defendant, a judgment was rendered against said H. K. Love as United States Marshal, for the sum of thirteen hundred twenty five dollars, together with costs in the sum of one hundred eighty three and 50-100 dollars, making a total of fifteen hundred eight dollars fifty cents, and the said defendant having, on the twenty-ninth day of May 1913, obtained an order extending his time within which to prepare, serve, and have settled his bill of exceptions to be used on the writ of error from the verdict and judgment in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, to and until the 31st day of August 1913, and having, on the same day, announced that he intends to and will petition for and prosecute a writ of error from the verdict and judgment aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit aforesaid, and having applied to the Court for an order fixing the amount of security which defendant shall be required to give and furnish to stay proceedings and for costs on said writ of error, and thereupon the Court having made its order that, on the defendant's filing with the clerk of this Court a good and sufficient bond in the sum of twenty five hundred dollars, to the effect that, if the said defendant and plaintiff in error shall prosecute his said writ of error to effect within the time allowed by law and shall an-



swer and pay all judgments, damages, and costs, if he shall fail to make good his said plea, then said obligation to be void, otherwise to remain in full force, effect, and virtue, also that said bond shall be approved by the clerk of this Court or any of his deputies, and that, on the approval and filing thereof, all further proceedings in this case shall be stayed and suspended until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and the Court having further ordered that said bond in the sum of twenty five hundred dollars shall operate both as a supersedeas bond and as a bond on writ of error, and the sum of twenty five hundred dollars having been fixed by the Court as sufficient to stay proceedings and for said supersedeas and cost bond on writ of error;

And whereas the above named defendant intends to prosecute said writ of error to said United States Circuit Court of Appeals for the Ninth Circuit to reverse the verdict and judgment in the above entitled cause;

Now, therefore, the conditions of the foregoing obligation are such that, if the said H. K. Love as United States Marshal, the defendant in the above entitled action, shall prosecute said writ of error to effect and shall answer and pay all damages and costs if he shall fail to make good his said plea on said writ of error, then this obligation shall be void, otherwise to remain in full force, effect, and virtue;

And whereas said defendant on writ of error desires to stay execution in the above entitled cause

pending the determination of said writ of error,

Now, therefore, the further condition of this obligation is such that, if the said H. K. Love as United States Marshal shall prosecute said writ of error to effect and shall answer and pay all damages, costs, and judgments, if he shall fail to make good his said plea, then the foregoing obligation to be void, otherwise to remain in full force, effect, and virtue.

H. K. LOVE,

United States Marshal.

By JOHN B. MATHEWS,

Deputy.

J. D. REAGH,

Surety.

H. B. PARKIN,

Surety.

Territory of Alaska,

Fairbanks Precinct.—ss.

J. D. Reagh and H. B. Parkin, being first duly sworn, each for himself and not one for the other, doth depose and say that he is a resident of Fairbanks Precinct, Territory of Alaska, and is worth the sum of twenty five hundred dollars, to wit, the sum specified as the penalty in the foregoing bond, over and above all his just debts and liabilities, in property not exempt from execution and situate within the Territory of Alaska.

J. D. REAGH.

H. B. PARKIN.

Subscribed and sworn to before me on this sixth day of June, A. D. one thousand nine hundred thir-



teen.

(Seal)            RICHARD H. GEOGHEGAN,  
Notary Public in and for the Territory of Alaska.

My Commission expires 24 Aug., 1914.

Service admitted of the foregoing bond and it is stipulated that the same is sufficient in form and the sureties thereon are sufficient; also that the same may be approved by the clerk and the Court.

7 June 1913.

H. A. DAY,

One of the Attorneys for Plaintiff.

The within bond is hereby approved as to form and sufficiency of sureties and execution is stayed until the determination of the writ of error herein.

7 June 1913.

(Seal)

C. C. PAGE, Clerk,  
By H. C. GREEN, Deputy.

F. E. FULLER,

Dist. Judge.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jun. 7, 1913. C. C. Page, Clerk.  
By H. C. Green, Deputy.

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[Title of Court and Cause.]

**Petition for Writ of Error.**

The defendant, feeling himself aggrieved by the judgment of this court, made and entered in the above entitled cause on the 24th day of May, 1913, wherein and whereby the above named court rendered judgment against the defendant for the sum of thirteen hundred and twenty-five dollars (\$1325.00), together

with interest thereon from the date of said judgment, until paid, at the rate of eight percent (8 per cent) per annum, together with costs in the sum of one hundred eighty-three and 50-100 dollars (\$183.50),

Now come Messrs. McGowan & Clark, attorneys for defendant, and petition this Honorable Court for an order allowing this defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, according to the laws in that behalf made and provided; and

WHEREAS the said defendant desires a stay of execution pending the hearing of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and has heretofore applied to this court for an order staying proceedings pending said hearing, and this court has granted an order fixing said bond, by virtue of which a bond has heretofore been filed and approved by this court, as more fully appears by the said bond and the approval thereof,

NOW, THEREFORE, this defendant petitions that all further proceedings in this court may be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit,

And your petitioner will ever pray.

Dated at Fairbanks, Alaska, this January 16th, 1914.

McGOWAN & CLARK,  
Attorneys for Defendant.



(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 16, 1914. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Assignment of Error.**

Comes now the defendant, being the plaintiff in error herein, and assigns the following errors as having been committed by the above named court during the trial of the above entitled action, which errors the said defendant and plaintiff in error intends to, and does, rely upon in his writ of error to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit:

**I.**

The Court erred in admitting, over defendant's objection, the testimony of the witness, Vaso Pavlovich, substantially as follows:

(a) Prior to the 18th day of May, 1912, I furnished Sam Vlik & Co. with horsefeed. I paid freight on five tons I paid \$80.00 for freight and \$362.75 for the feed. I gave Sam Vlik \$110.00. **Ex. 1 B of E.**

(b) Sam Vlik & Co. agreed to pay me for this feed and money that I paid. **Ex. 2 B of E.**

(c) I posted four notices of that kind on the wood in dispute in this case. I divided these notices on four corners. I put them up on the 18th of May. **Ex. 3 B of E.**

**II.**

The Court erred in overruling and denying the defendant's motion for a non-suit and a directed ver-

dict. **Ex. 4 B of E.**

III.

The Court erred in rejecting the evidence of the witness, Paul Ringseth as to his attendance before the Commissioner at Chatanika during the trial of the action of Ringseth vs. Sam Vlok & Co., which was sought to be introduced to show that the Commissioner waited over one hour before entering the judgment in that case, and in sustaining plaintiff's objection to the question:

Q. Did you attend before the Commissioner at Chatanika at the time that the summons was returnable? **Ex. 5 B of E.**

IV.

The Court erred in rejecting the evidence of the witness, Samuel R. Weiss, the Commissioner at Chatanika, as to the time of the rendition of the judgment in the case of Ringseth vs. Vlik & Co., which was sought to be introduced for the purpose of showing that the judgment was not made or entered in said docket until after the hour of 3 p. m. on the 24th day of May, 1912, and that he waited one hour before entering said judgment; and in sustaining the objection of plaintiff that the docket was the best evidence and in refusing to allow said witness to answer the following question:

Q. Referring to case No. 35, Paul Ringseth vs. Sam Vlik & Co., and to page 501 of your docket, to the entry of May 24th, will you kindly state when that entry was made. **Ex. 6 B of E.**

V.



The Court erred in denying defendant's offer to prove the matters set forth in the previous assignment of error and instructing the jury not to consider the offer as testimony in the case. **Ex. 6 B of E.**

#### VI.

The Court erred in denying the offer in connection with the case of Jack McLean vs. Sam Vlik & Co. wherein defendant offered to prove that the docket entry of judgment in said case was not made or entered in said docket until after the hour of four p. m. of said 24th day of May, 1912, to which offer the plaintiff made the same objection, and thereupon the court denied said offer and instructed the jury to disregard the same. **Ex. 7 B of E.**

#### VII.

The Court erred in permitting the witness, Peter Vidovich, called in rebuttal, to answer the following questions, over the defendant's objections, to-wit:

(a) "Q. I will ask you to state, Mr. Vidovich, whether at that time and place, and in the presence of you and Mr. Brown and Mr. Day, that Mr. Brown, referring to this matter, stated to you and Mr. Day in substance as follows: That you were talking about this attachment, and that Mr. Brown stated to Judge Day and to you in substance that he, Brown, only attached the 3 or 3½ cords of wood, and that was the small pile; and that was where he, Brown placed his notices of attachment,—on the small pile; and that that small pile was all the wood that he, Brown, attached?" to which question the witness answered "Yes sir." **Ex. 8 B of E.**

(b) "Q. Didn't Mr. Brown say to you, or to Judge Day in your presence at that time, that, when this case came to trial that he would go on the witness stand and swear to that, that only 3½ cords of wood were attached by him?", to which question the witness answered "He did say so." **Ex. 9 B of E.**

### VIII.

The Court erred in permitting the witness, H. A. Day, called in rebuttal, to answer the following question, over the objection of defendant, to-wit:

(a) "Q. Mr. Day, you may state to the jury whether or not, on the 19th day of May 1912, you, in company with Mr. Peter Vidovich, went to the United States Marshal's office in Fairbanks, Alaska, and then and there had a conversation with Mr. Carlson, the deputy United States Marshal, concerning the suit and the attachment therein, in the case of Paul Ringseth against Sam Vlik & Co., in the commissioner's court at Chatanika, before Sam Weiss, justice of the peace." to which the witness answered:

"A. Yes, we were there, I wouldn't swear to the date positively, but it was about that time." **Ex. 10 B. of E.**

(b) "Q. Mr. Day, I will ask you whether or not, in the presence of you and Mr. Peter Vidovich only, that Mr. Brown, United States deputy marshal, at that time in your office, some time during the summer on the date which he testified to, when you were talking about this particular case of Paul Ringseth vs. Sam Vlik & Co. and the attachment thereunder sued out in the case before commissioner Weiss of



Chatanika in the Fairbanks Precinct, whether or not Mr. Brown said to you in substance that he, Brown, only attached 3 or 3½ cords of wood under this attachment, and that that was the small pile of wood, and that that was the place,—on the small pile of wood,—where he, Brown, posted the notice of attachment, and that that was all the wood that he, Brown, attached in that suit. I will ask you whether or not that was the substance of what Mr. Brown said to you and Mr. Vidovich at that time and place.” to which the witness answered:

“A. He stated substantially that.” **Ex. 11 B of E.**

#### IX.

The Court erred in denying defendant’s motion for instructed verdict, which motion was made by defendant after the testimony had closed. **Ex. 12 B of E.**

#### X.

The Court erred in permitting the case to be submitted to the jury, over the defendant’s objection and motion for a directed verdict.

#### XI.

The Court erred in refusing to instruct the jury as requested by the defendant in the following particulars:

(a) In refusing to give the following part of defendant’s requested instruction No. II, as follows:

“or (2) the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, to the effect that the same is made in good faith, to secure the amount named therein, and without any

design to hinder, delay, or defraud creditors, and be acknowledged and filed in the office of the Recorder of the precinct in which the property is situate, and be indexed in the record of chattel mortgages, and the original thereof retained by the said Recorder for the examination of all persons who may be interested therein." **Ex. 13 B of E.**

(b) In modifying defendant's requested instruction No. III by adding thereto the following words:

"or was prevented from so doing by the possession or acts of the defendant." **Ex. 14 B of E.**

(c) In refusing to give defendant's requested instruction No. IV, which reads as follows:

"I instruct you that, if you find that said alleged bill of sale, offered by the plaintiff in this case, was, in reality, intended as a chattel mortgage, and was not filed and indexed as such in the office of the Recorder, as required by law, then said mortgage is void and of no effect." **Ex. 15 B of E.**

(d) In refusing to give defendant's requested instruction No. VI, which reads as follows:

"I instruct you that, in order for the plaintiff in this action to have acquired possession of the wood in controversy after the entry of the judgments in the cases of Ringseth vs. Vlik & Co., and McLean vs. Vlik & Co., on the 24th day of May 1912, it was necessary for him to take such actual possession thereof as would be notice to the world, and to this defendant in particular, that he was claiming and asserting a claim thereto, and, if you find that the plaintiff did not take such possession, between the



time of the rendition of such judgments on the 24th day of May 1912, and prior to the levy of the execution issued out of the Commissioner's Court at Chatanika, in the cases above mentioned, then the lien of said judgments, acquired by the levy of such executions, is paramount and superior to any possession claimed by the plaintiff in this action, and the United States Marshal had the right to sell the property under the writs of execution in those cases."

**Ex. 16 B of E.**

(e) In refusing to give defendant's requested instruction No. VII, which reads as follows:

"You are instructed that, if at the time when the defendant levied the executions above mentioned, on the wood in controversy herein, the plaintiff herein was not in the actual possession of said wood, then the levy on said executions was properly made, and the defendant was entitled to hold said property thereunder. **Ex. 17 B of E.**

(f) In refusing to give that portion of defendant's requested instruction No. VIII, which reads as follows:

"And if you believe, from the evidence in this case, that the alleged bill of sale, offered by the plaintiff, was made by Sam Vlik & Co. to the plaintiff with the understanding that the same was made for the purpose of protecting the plaintiff, as against other creditors of Sam Vlik & Co., then I instruct you that the said transfer was fraudulent as against the plaintiffs in said actions, namely, as against Paul Ringseth and Jack McLean, and if you

so find, then your verdict in this action should be for the defendant." **Ex. 18 B of E.**

(g) In refusing to give defendant's requested instruction No. IX, which reads as follows:

"You are further instructed that every conveyance or assignment in writing, or otherwise, of any interest in lands or things in action, or any rents or profits issuing therefrom, and every charge on lands, goods, or things in action, or on the rents or profits thereof, made by any person with intent to hinder, delay, or defraud creditors, or other persons, of their lawful suits, demands, debts or damages, as against the person so hindered, delayed, or defrauded, is void, and if you find, from the evidence in this case, that Sam Vlik & Co. executed the bill of sale produced by plaintiff in this action with such intent, then your verdict should be for the defendant." **Ex. 19 B of E.**

(h) In refusing to give defendant's requested instruction No. X, which reads as follows:

"You are further instructed that, if you find, from the evidence in this case, that the defendant was in the lawful possession of the wood in controversy, under and by virtue of the writs of attachments mentioned herein, from the 17th day of May 1912 up to and including the 24th day of May 1912, then, even though the attachment may have expired by operation of law, the possession was that of the defendant until said date, and if the plaintiff did not either enter into possession or take possession of said wood on or before the 25th day of May 1912, when the execution in the case of Ringseth vs. Vlik & Co. was



levied, then the wood in controversy was in the legal possession of the United States Marshal, as alleged in defendant's answer herein." **Ex. 20 B of E.**

(i) In refusing to give defendant's requested instruction No. XI, which reads as follows:

"You are instructed that the judgments in the cases of Ringseth vs. Sam Vlik & Co. and McLean vs. Sam Vlik & Co. are valid judgments for the purposes of this case, and are binding on the plaintiff, and that the executions issued thereunder and said judgments kept in force the attachments in said actions, and the property levied on thereunder was at all times subject to the executions issued in said actions, and the plaintiff in said actions, by virtue of said attachments, had valid liens on the wood in controversy from the 18th day of May 1912 until the time when the said property was sold under the executions issued therein." **Ex. 21 B of E.**

(j) In refusing to give defendant's requested instruction XII, which reads as follows:

"You are instructed that the attachment liens of Ringseth vs. Vlik & Co. and McLean vs. Vlik & Co. were not lost, destroyed, waived, or abandoned by the plaintiff in said actions, by reason of the failure of the Commissioner, in whose Court said actions were pending, to insert in said judgments an order foreclosing said liens, and that the words "Let execution issue" were a sufficient order of foreclosure." **Ex. 22 B of E.**

(k) In modifying defendant's requested instruction No. XIII, by inserting the following words:

“And if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Co.” **Ex. 23 B of E.**

(l) In refusing to give defendant’s requested instruction No. XIV, which reads as follows:

“You are instructed that, if you find from the evidence that said alleged bill of sale, given to the plaintiff in this action on the 18th day of May 1912, was in reality a chattel mortgage, and that said plaintiff actually took possession of said property under said chattel mortgage, and actually held possession thereof, when said property was taken under the executions by the defendant in this action, in the case of Ringseth vs. Vlik & Co. and McLean vs. Vlik & Co., you can not, under any circumstances, find a verdict in favor of the plaintiff in this action for a greater sum than the amount of the indebtedness which said alleged mortgage was given to secure; and, if you find the foregoing facts to be true, you can not, under any consideration, find for said plaintiff in a sum greater than the actual market value of the wood so seized by the defendant, as proved by the evidence in this case.” **Ex. 24 B of E.**

(m) In refusing to give defendant’s requested instruction No. XVI, which reads as follows:

“You are further instructed that the evidence in this case conclusively shows that Paul Ringseth and Jack McLean are judgment creditors of Sam Vlik & Co., and that, if the bill of sale offered by the plaintiff was made for the purpose of hindering and delaying them in the collection of their just debts



and demands, then your verdict must be in favor of the defendant." **Ex. 25 B of E.**

(n) In refusing to give defendant's requested instruction No. XVII, which reads as follows:

"You are instructed that, if you should find, from the evidence, that the possession of the defendant under the attachment liens above referred to was lost by the failure of the defendant to have the attachment foreclosed in the judgments above mentioned, and that thereafter the defendant acquired a valid lien under the executions hereinbefore mentioned, then his possession, so obtained, would be valid, unless the plaintiff had actual possession and control of said personal property." **Ex. 26 B of E.**

to all of which rulings, the defendant excepted.

## XII.

The Court erred in instructing the jury in the following particulars:

(a) In instructing the jury as set forth in instruction No. IX, which reads as follows:

"And, if you find from the evidence in this case that the bill of sale offered by the plaintiff was intended as a chattel mortgage, then I instruct you that the said mortgage is void as to prior creditors in good faith for value, unless the plaintiff in the action entered into the actual possession of such property and retained possession thereof, or unless you find that he was prevented from so doing by the possession or acts of the defendant." **Ex. 27 B of E.**

(b) In instructing the jury as set forth in instruction No. XI, which reads as follows:

“You are instructed that where absolute ownership is claimed and only special property in the thing claimed is shown—as would be the case if the plaintiff instead of showing absolute ownership should show a conditional sale, or this bill of sale operated as a chattel mortgage—that that is sufficient to sustain a recovery provided that it also appear that the plaintiff has the right of immediate possession of the property.” **Ex. 28 B of E.**

(c) In instructing the jury as set forth in instruction No. XII, which reads as follows:

“You are instructed that property may be sold or mortgaged subject to the lien of an attachment, and the sale or mortgage becomes absolute when the lien of the attachment is removed or lost.” **Ex. 29 B of E.**

(d) In instructing the jury as set forth in instruction No. XIII, which reads as follows:

“You are instructed that the judgments given in the Commissioner’s Court at Chatanika on May 24, 1912, that have been introduced in evidence in this case, did not contain any order that the property attached theretofore in the actions in which said judgments were given should be sold to satisfy the demands of the plaintiffs in said actions, and that therefore as a matter of law said plaintiffs waived and lost any lien theretofore secured upon the property in question by reason of the attachments theretofore issued in said actions, and that the defendant was not therefore longer entitled to the possession of said property under said writs of attachment, if



you should find that they had been theretofore duly levied." **Ex. 30 B of E.**

(e) In instructing the jury as set forth in instruction No. XIV, which reads as follows:

"And you are further instructed that if you find that the plaintiff had become the owner of said wood and entitled to the immediate possession thereof prior to the date of the levy thereon by the defendant under the writs of execution (evidence of which has been given before you) by reason of the bill of sale to the plaintiff from Sam Vlik & Company, then the defendant was without right to hold such property under such levies, or to sell or dispose of the same."

**Ex. 31 B of E.**

(f) In instructing the jury as set forth in instruction No. XV, which reads as follows:

"You are instructed that if you find by a preponderance of evidence that on May 18th, 1912, Sam Vlik & Company was indebted to the plaintiff in the sum of seventeen hundred and twenty dollars, or any other substantial sum, and, that in consideration of such indebtedness, and without intent to hinder, delay or defraud the creditors of said Vlik & Company, or without previous knowledge of such intent on the part of the plaintiff, then executed and delivered to the plaintiff the bill of sale of said property; and, if you further find by a preponderance of evidence that the plaintiff thereupon acquired the right to the immediate possession of said property, and that plaintiff did on or about May 18, or at any time before the levy of the executions herein mentioned, take

possession of said wood, or notify the defendant of his claim of ownership and right of possession thereof, or that the defendant was otherwise notified of such ownership and right of possession, then you are instructed that the levy or attempted levy under such writs of execution was without authority, and that the defendant did not thereby secure any right to hold such wood under such levy, or to sell the same thereunder." **Ex. 32 B of E.**

(g) In giving that part of instruction No. XVI, which reads as follows:

"Provided that you further find that the plaintiff had previous knowledge of the fraudulent intent of said Vlik & Company." **Ex. 33 B of E.**

(h) In giving that part of instruction No. XIX, which reads as follows:

"And if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Company." **Ex. 34 B of E.**

(i) In instructing the jury as set forth in instruction No. XX, which reads as follows:

"You are instructed that if you find from the evidence that said alleged bill of sale given to plaintiff in this action on the 18th day of May 1912, was in reality a chattel mortgage, and that the plaintiff actually took possession of the property under said chattel mortgage and actually held possession thereof when said property was taken under execution by the defendant in this action in the case of Paul Ringseth vs. Sam Vlik and Company and Jack McLean vs. Sam Vlik & Company, you can not under



such circumstances find a verdict in favor of the plaintiff in this action for a greater sum than the amount which said alleged mortgage was given to secure; and, if you find the foregoing facts to be true, you can not under any circumstances find for the plaintiff in a sum greater than the actual market value of the wood so seized by defendant at the time and place of such seizure as proved by the evidence in this case." **Ex. 35 B of E.**

To the giving of all of which instructions the defendant duly excepted.

**McGOWAN & CLARK**

**Attorneys for Defendant.**

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 16, 1914. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Order Allowing Writ of Error.**

Upon motion of Messrs. McGowan & Clark, attorneys for defendant, and the filing of a petition for writ of error and the assignment of error,

IT IS ORDERED that the writ of error be, and same is, allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, the judgment heretofore made and entered on the 24th day of May, 1913, and that the amount of the bond on said writ of error be, and the same is, hereby fixed at the sum of two thousand five hundred dollars (\$2,500.), pursuant to the order of

this court heretofore made and entered herein and the bond heretofore given herein, to cover supersedeas, costs and damages of defendant in error.

IT IS FURTHER ORDERED that the bond heretofore and on the 7th day of June, 1913, filed herein, for the above amount, shall act and take effect as a supersedeas bond on writ of error.

Done in chambers this 16th day of January, A. D. 1914.

F. E. FULLER,  
District Judge.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 16, 1914. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Writ of Error.**

UNITED STATES OF AMERICA,  
Territory of Alaska.—ss.

The President of the United States of America, to the Hon. Frederic E. Fuller, Judge of the District Court, Territory of Alaska, 4th Judicial Division,  
**GREETING:**

Because in the records and proceedings, as in also the rendition of judgment dated May 24, 1913, of a plea which is in said District Court for the Territory of Alaska, 4th Division, before you, between Vaso Pavlovich as plaintiff and H. K. Love, United States Marshal, as defendant, manifest error hath happened, to the great prejudice and damage of said H. K. Love, United States Marshal, defendant as aforesaid, as is



said and appears by his petition herein,

We, being willing that error, if any hath been, shall be duly corrected and speedy justice done to the parties aforesaid in this behalf, do command you that if said judgment be therein given, then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, State of California, together with this writ, so as to have the same at said place, in said circuit, on the 14th day of February, A. D. 1914, that the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein, to correct those errors what of right, according to the laws and the customs of the United States, should be done.

WITNESS the Hon. Edward D. White, Chief Justice of the United States of America, this 16th day of January, A. D. 1914.

Attest my hand and seal of the District Court, Territory of Alaska, Fourth Division, at the clerk's office at Fairbanks, Alaska, on this 16th day of January, A. D. 1914.

(Seal)

ANGUS McBRIDE,  
Clerk.

Allowed this 16th day of January, A. D. 1914.

F. E. FULLER,  
Judge District Court, Territory of  
Alaska, 4th Division.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 16, 1914. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Citation on Writ of Error.**

UNITED STATES OF AMERICA,  
Territory of Alaska.—ss.

The President of the United States of America, to Vaso Pavlovich and to H. A. Day and M. E. Stevens, Esqs., his attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty (30) days of this citation, pursuant to writ of error filed in the office of the Clerk of the District Court, Territory of Alaska, Fourth Division, wherein Vaso Pavlovich is defendant in error and H. K. Love, United States Marshal, is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

WITNESS the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States of America, on this 16th day of January A. D. 1914, and in the year of our Independence the one hundred and thirty-eighth.

F. E. FULLER,  
District Judge, Presiding in and for the District



Court, Territory of Alaska, Fourth Division.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 16, 1914. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Admission of Service.**

Service is hereby admitted of the assignment of errors and petition for writ of error this day filed in the above entitled action.

Fairbanks, Alaska, January 16, 1914.

H. A. DAY, MORTON E. STEVENS,

Attorneys for Plaintiff.

Service is also admitted of the order allowing writ of error, writ of error, citation on writ of error, this day filed in the above entitled action, and also of the bond on writ of error etc. heretofore served and filed.

Fairbanks, Alaska, January 16, 1914.

H. A. DAY, MORTON E. STEVENS,

Attorneys for Plaintiff.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Mar. 24, 1914. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Designation of Place for Hearing of Writ of Error.**

To the Honorable FREDERIC E. FULLER, Judge of the Above-named Court, and to Plaintiff and his attorneys:

Now comes the defendant, the plaintiff in error

in the above entitled action, and, pursuant to the provisions of an act of Congress, giving the designation of the place of hearing appeals for the Ninth Circuit to the plaintiff in error, does hereby designate the City and County of San Francisco, in the State of California, as the place for the hearing of the writ of error in the above entitled action.

**McGOWAN & CLARK,**

**Attorneys for Defendant**

Due service hereof admitted this Mar. 24, 1914.

**H. A. DAY, MORTON E. STEVENS,**

**Attorneys for Plff.**

Filed in the District Court, Territory of Alaska, 4th Div., Apl. 6, 1913. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Order Extending Return Day on Citation on Writ  
of Error.**

Upon motion of attorneys for defendant, and it appearing to the satisfaction of the court that it is necessary, owing to the great distance from Fairbanks, Alaska, to San Francisco, California, and the slow and uncertain means of communication between said places, that an order extending the time within which to docket the above entitled cause and to file the record therein with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, should be made; and the Court being fully advised in the premises and deeming that good cause exists therefor,

**IT IS HEREBY ORDERED** that the time within



which said defendant (plaintiff in error) shall perfect said cause upon writ of error herein and docket and file the record thereof in said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby, enlarged and extended to and including the first day of May, A. D. 1914.

Done in open court this 13th day of February, A. D. 1914.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 12, page 856.

Due service hereof admitted this Feb. 13, 1914.  
H. A. Day, Morton E. Stevens, Attorneys for Plaintiff.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Feb. 13, 1914. Angus McBride, Clerk.

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[Title of Court and Cause.]

**Praeipice for Transcript.**

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare a transcript of the record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, situate at San Francisco, California, under writ of error heretofore perfected to said Court, and include in said transcript the following papers, to-wit:

1. Amended Complaint,
2. Answer.

3. Third Amended Reply.
4. Bill of Exceptions.
5. Order Relative to Supersedeas and Cost Bond on Writ of Error.
6. Bond.
7. Petition for Writ of Error.
8. Assignment of Error.
9. Order Allowing Writ of Error.
10. Writ of Error.
11. Citation on Writ of Error.
12. Admission of Service.
13. Designation of Place for Hearing on Writ of Error.
14. Order Extending Return Day on Citation on Writ of Error.
15. Praecipe for Transcript.
16. Stipulation Relative to Printing Record.

This transcript is to be prepared as required by law and the orders and rules of this Court and the United States Circuit Court of Appeals for the Ninth Circuit, and is to be printed and certified to by you under and by virtue of the rule of this Court for printing of records on appeal or writ of error, made March 21, 1914, and when so printed and certified is to be filed in the office of the Clerk of said United States Circuit Court of Appeals in San Francisco, California, on or before the first day of May, 1914, pursuant to order of this Court extending the time to file said record.

McGOWAN & CLARK,

Attorneys for Defendant.



Due service of the within Praecept and receipt of a copy thereof are hereby acknowledged this 10th day of April 1914 and consented that said papers shall constitute the record on writ of error herein.

H. A. DAY & MORTON E. STEVENS,

Attorneys for Defendants in Error.

Filed in the District Court, Territory of Alaska,  
4th Div., Apr. 11, 1914. Angus McBride, Clerk.

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**Clerk's Certificate to Record.**

United States of America,  
Territory of Alaska,  
Fourth Division.—ss.

I, ANGUS McBRIDE, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 167 pages, numbered from 1 to 167, inclusive, constitutes a full, true and correct transcript of the record on writ of error in Cause No. 1785, entitled Vaso Pavlovich, Plaintiff, vs. H. K. Love, United States Marshal, Defendant, wherein H. K. Love, United States Marshal, is Plaintiff in Error, and Vaso Pavlovich is Defendant in Error, and was made pursuant to and in accordance with the praecipe of the Plaintiff in Error, filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause, and is the return thereof in accordance therewith; and I further certify that this transcript of record was printed under and by virtue of and in compliance with a "Rule for Printing Records on Appeal or Writ of Error", made by this Court on the 21st day of March.

1914, and that said transcript of record was indexed by me pursuant to said rule, and that the index thereof, consisting of pages i to iv, is a correct index of said transcript of record; also that the costs of preparing said transcript and this certificate, amounting to sixty-two and 75-100 dollars (\$62.75), has been paid to me by counsel for Plaintiff in Error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, this fifteenth day of April, 1914.

(Seal.)

ANGUS McBRIDE,  
Clerk District Court, Territory  
of Alaska, 4th Division.





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NO. 2422.

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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H. K. LOVE, United States Marshal,

*Plaintiff in Error,*

VS.

VASO PAVLOVICH,

*Defendant in Error.*

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**BRIEF OF PLAINTIFF IN ERROR.**

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McGOWAN & CLARK,

Fairbanks, Alaska,

*Attorneys for Appellant.*

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*Filed this.....day of September, 1914.*

**Filed**

....., Clerk.

By ....., Deputy Clerk.

SEP 25 1914

F. D. Munroe,  
Clerk.





NO. 2422.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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H. K. LOVE, United States Marshal,

*Plaintiff in Error,*

VS.

VASO PAVLOVICH,

*Defendant in Error.*

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## BRIEF OF PLAINTIFF IN ERROR.

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### The Case.

This is an action commenced by Vaso Pavlovich against H. K. Love in his capacity as United States Marshal for the Fourth Division of the Territory of Alaska, for damages against said United States Marshal for selling certain wood claimed by said Pavlovich. The facts as they developed in the case are as follows:

Prior to May 17, 1912, Sam Vlik & Co., a copartnership composed of several Austrians, were mining on the Chatanika Flats, Fourth Judicial Division, Territory of Alaska, and on said day were indebted to Paul Ringseth, a merchant of Chatanika, in the sum of \$1,000.00, and to Jack McLean, a laborer employed by them, in the



sum of \$1,000.00, as well as to numerous other persons, including the plaintiff Pavlovich. On the evening of May 17, 1912, Paul Ringseth instituted an action in the Justice or Commissioner's Court for Fairbanks Precinct, at Chatanika, filed the necessary bond and had writ of attachment issued by the Commissioner, which, together with summons, was placed in the hands of Lysle Brown, a Deputy United States Marshal, for service. Brown went from the Commissioner's office to the claim where Vlik & Co. were engaged in mining, distant about a half mile, and there served the summons in the action upon Dan Vlik, one of the copartners, and also served him with a copy of the writ of attachment, and posted two or more notices of attachment on the claim (Tr. pp. 58-59-60). The defendant alleged that he posted notice of said attachment on a large pile of wood, which is the wood in controversy in this action. He also testified that he posted notices of attachment on a post close to the wood, and there was some testimony to the effect that another notice was posted on the ground. He appointed the plaintiff in that action, Paul Ringseth keeper (Tr. p. 65). Later on the same evening, Jack McLean, in the same court, instituted suit against Sam Vlik & Co. for the sum of \$1,000.00, took out a writ of attachment, and placed same in the hands of Deputy Marshal Brown, who served it in the same manner (Tr. pp. 46-47-61).

On the night of May 17, Sam Vlik, a member of Vlik & Co., went to the cabin where Pavlovich was living and informed him that he wanted him to go to Fairbanks

with him in the morning, as he was going to give him a bill of sale of the wood on the claim (Tr. p. 29). They went to Fairbanks on the morning of the 18th, a bill of sale was prepared from Sam Vlik & Co. to Vaso Pavlovich, for a purported consideration of \$2,000.00, and was recorded (Tr. pp. 22-24). This bill of sale was executed without the knowledge of the other members of the copartnership of Vlik & Co. (Tr. p. 45).

That said bill of sale given by Vlik & Co. to Pavlovich was intended as security for Pavlovich's claim, and any amount that the wood, covered by the bill of sale, sold for, in excess of the claim of said Pavlovich, was to be returned to Sam Vlik (Tr. p. 34).

Pavlovich claims to have put up, on the night of May 18, 1912, notices on the wood (Tr. p. 25), claiming same as his own, and to have measured it afterwards (Tr. pp. 25-34).

On May 24, judgment was secured in the Commissioner's Court, in the cases of Ringseth v. Vlik & Co. (Tr. p. 74), and McLean v. Vlik & Co. (Tr. p. 75). The record shows that the judgment was secured by default, but fails to show that the Justice or Commissioner waited one hour before entering judgment. The Justice also failed to enter judgment to foreclose the attachment lien theretofore secured.

Execution was issued in Ringseth v. Vlik & Co. on May 24, 1912 (Tr. p. 77), and on May 25, the wood in controversy was seized (Tr. p. 78), and thereafter, on June 6th, 1912, 123 cords of the wood was sold by the Marshal at public auction, and purchased by Paul Ring-



seth for the sum of \$1,076.25 (Tr. pp. 89-90).

On June 12, 1912, an execution was issued in the case of McLean v. Vlik & Co. (Tr. p. 79), the Marshal levied upon the balance of the wood remaining on the claim, together with other personal property, and sold the same on the 25th day of June, 1912, to said Ringseth for \$275.00 (Tr. pp. 88-89).

At the time of the first sale, Pavlovich was present with an interpreter and notified the Marshal that the wood was his (Tr. p. 27). Pavlovich was never in possession of the wood, except through posting notices after the same had been seized by the United States Marshal.

The plaintiff admits the seizure of three cords of wood, but denies the seizure of the wood in controversy (Tr. p. 16). The wood purchased by Ringseth under the first sale was 123 cords at \$8.50 per cord, and under the second sale, under the McLean judgment, was 40 cords at substantially the same price.

On April 25, 1913, the cause being at issue, went to trial before the Hon. Frederic E. Fuller, sitting with a jury duly impaneled and sworn, and was thereafter continued from day to day until the close of the plaintiff's case, at which time the defendant moved for a non-suit and directed verdict (Tr. pp. 54-55-56), which motion was denied. The defendant proceeded with his defense, and after defendant had rested (Tr. p. 100), the plaintiff put in his case in rebuttal (Tr. pp. 100-105). After testimony had been closed, the defendant renewed his motion for an instructed verdict (Tr. pp. 105-106), which motion was by the Court denied (Tr. p. 106).

Thereafter arguments were had to the jury and the Court was requested by the defendant to submit to said jury certain instructions (Tr. pp. 107-115), a part of which the Court gave and a part of which the Court refused. The Court instructed the jury (Tr. pp. 117-127) and the defendant, in the manner prescribed by law and the rules of court, duly excepted to said instructions given by the Court (Tr. pp. 127-128), and excepted to the Court's refusal to give certain instructions offered by defendant (Tr. pp. 112-117). Thereafter the matter was submitted to the jury, and on April 29, 1913, the jury brought in a verdict in favor of plaintiff and against the defendant in the sum of \$1,325.00 (Tr. p. 128).

Thereafter, and within the time prescribed by law, the defendant moved for a new trial (Tr. pp. 129-130-131), and on May 24, 1913, after argument heard by the Court, said motion was denied (Tr. p. 132), and on May 24, 1913, a judgment was regularly given, made and entered upon said verdict, in favor of the plaintiff and against the defendant, for the sum of \$1,325.00 and costs (Tr. pp. 132-133). On November 12, 1913, the defendant presented to the court for settlement his bill of exceptions, and said bill of exceptions was on said day duly settled by the Court (Tr. pp. 135-136). Thereafter, on January 16, 1914, a petition for writ of error was filed (Tr. pp. 142-143), together with assignments of error (Tr. pp. 144-158), and on January 16, 1914, an order was made allowing writ of error (Tr. pp. 158-159). Writ of error and citation were issued on January 16, 1914 (Tr. pp. 159-162).



The plaintiff contends (1) that the bill of sale from Vlik & Co. to plaintiff, Vaso Pavlovich (defendant in error), dated May 18, 1912, was a valid transfer of the title to said property and that Vaso Pavlovich took possession of said property on the night of May 18, 1913, by posting notices on said property and by measuring same a few days subsequent thereto, and that the defendant H. K. Love, as United States Marshal, seized three cords only of the wood; (2) that the failure of the United States Commissioner at Chatanika to enter an order foreclosing the attachment liens of Paul Ringseth and Jack McLean in their judgments, deprived said Ringseth and McLean of any rights they acquired by reason of the attachment; (3) that the judgments under which the sale was made by the United States Marshal, in Ringseth v. Vlik & Co. and McLean v. Vlik & Co., were void for the reason that they did not show that said Commissioner waited for one hour after the time fixed for the return on the summons, before entering judgment, and that any sale under executions issued in said causes was void; (4) that even if the original attachments in said two cases had been regularly issued and levied on all of the wood, when the Commissioner, in entering judgment, failed to foreclose the attachment liens in the judgments entered, the possession taken by said Pavlovich, by posting notices on said wood, was automatically extended and took effect upon the moment of the rendering judgment in said causes, without foreclosing the attachment liens, and that an execution issued on said judgments, even if they were valid, would be ineffective

as against the possession of said Pavlovich, and that a sale under said executions would be a conversion of the property.

The defendant contends (1) that the alleged bill of sale to Pavlovich from Vlik & Co. was fraudulent and intended to hinder, delay and defraud other creditors of Vlik & Co.; (2) that it was not intended as a bill of sale, but was in reality a mortgage, and as it was not executed with the formalities prescribed by the laws of Alaska, was void because said Pavlovich did not enter into immediate possession of the property covered by said alleged bill of sale and did not continue in possession thereof; (3) that said transfer was made in trust for Vlik & Co.; (4) that the defendant had actually taken possession of all the wood in controversy and that a keeper was in charge thereof at the time Pavlovich attempted to take possession thereof and that Pavlovich never was in possession, either actual or constructively, of said wood; (5) that the defendant should have been permitted to prove by parol testimony that the Commissioner waited one hour, as prescribed by law, after the time designated as the return on said summons, in the cases of Ringseth v. Vlik & Co. and McLean v. Vlik & Co., before judgment was entered; (6) that even though the transfer to Pavlovich was a valid transfer, that by reason of his failure to take possession of the property in controversy, between the time the judgment was rendered in each of said cases and the time said property was seized under execution, said property was still subject to seizure and sale by the United States Marshal under the executions;



that plaintiff could not take constructive possession of the property, under the law, if the attachment lien had been lost (if it was lost) by virtue of having posted notices on the wood, at a time when the property was in the possession of the United States Marshal; (7) that plaintiff never was in possession of the property and that the rights acquired by attaching creditors, prior to the execution of the alleged bill of sale, were paramount to any rights obtained by the plaintiff, either as a mortgagee or as a purchaser of said wood from Vlik & Co.; (8) that the alleged bill of sale made by one member of a mining copartnership, without the concurrence of the other members thereof, did not pass such title to Pavlovich as to create any lien on the property or claim thereto by reason thereof; (9) that if said alleged bill of sale was in reality a mortgage, plaintiff had no title in the property covered thereby, to support an action for conversion, his only action being one in replevin to recover possession of the property.

The defendant relies upon the following assignment of error:

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### **Assignment of Error.**

#### **I.**

The Court erred in admitting, over defendant's objection, the testimony of the witness, Vaso Pavlovich, substantially as follows:

(a) Prior to the 18th day of May, 1912, I furnished Sam Vlik & Co. with horse feed. I paid freight on five tons. I paid \$80.00 for freight and

\$362.75 for the feed. I gave Sam Vlik \$110.00. (*Ex. 1 B. of E.*)

(b) Sam Vlik & Co. agreed to pay me for this feed and money that I paid. (*Ex. 2 B. of E.*)

(c) I posted four notices of that kind on the wood in dispute in this case. I divided these notices on four corners. I put them up on the 18th of May. (*Ex. 3 B. of E.*)

## II.

The Court erred in overruling and denying the defendant's motion for a non-suit and a directed verdict. (*Ex. 4 B. of E.*)

## III.

The Court erred in rejecting the evidence of the witness, Paul Ringseth, as to his attendance before the Commissioner at Chatanika during the trial of the action of Ringseth v. Sam Vlik & Co., which was sought to be introduced to show that the Commissioner waited over one hour before entering the judgment in that case, and in sustaining plaintiff's objection to the question:

Q. Did you attend before the Commissioner at Chatanika at the time that the summons was returned? (*Ex. 5 B. of E.*)

## IV.

The Court erred in rejecting the evidence of the witness, Samuel R. Weiss, the Commissioner at Chatanika, as to the time of the rendition of the judgment in the case of Ringseth v. Vlik & Co., which was sought to be introduced for the purpose of showing that the judgment was not made or entered in said docket until after the hour of 3 p. m. on the 24th day of May, 1912, and that he waited one hour before entering judgment; and in



sustaining the objection of plaintiff that the docket was the best evidence and in refusing to allow said witness to answer the following question:

Q. Referring to case No. 35, Paul Ringseth v. Sam Vlik & Co., and to page 501 of your docket, to the entry of May 24th, will you kindly state when that entry was made. (*Ex. 6 B. of E.*)

#### V.

The Court erred in denying defendant's offer to prove the matters set forth in the previous assignment of error and in instructing the jury not to consider the offer as testimony in the case. (*Ex. 6 B. of E.*)

#### VI.

The Court erred in denying the offer in connection with the case of Jack McLean v. Sam Vlik & Co., wherein defendant offered to prove that the docket entry of judgment in said case was not made or entered in said docket until after the hour of four p. m. of said 24th day of May, 1912, to which offer the plaintiff made the same objection, and thereupon the Court denied said offer and instructed the jury to disregard the same. (*Ex. 7 B. of E.*)

#### VII.

The Court erred in permitting the witness, Peter Vidovich, called in rebuttal, to answer the following questions, over the defendant's objections, to-wit:

(a) "Q. I will ask you to state, Mr. Vidovich, whether at that time and place, and in the presence of you and Mr. Brown and Mr. Day, that Mr. Brown, referring to this matter, stated to you and Mr. Day in substance as follows: That you were talking about this attachment, and that Mr. Brown stated to Judge Day and to you in substance that he (Brown)

only attached the 3 or 3½ cords of wood, and that was the small pile and that was where he (Brown) placed his notices of attachment,—on the small pile; and that that small pile was all the wood that he (Brown) attached?” to which question the witness answered, “Yes, sir.” (*Ex. 8 B. of E.*)

(b) “Q. Didn’t Mr. Brown say to you, or to Judge Day in your presence at that time, that, when this case came to trial, that he would go on the witness stand and swear to that, that only 3½ cords of wood were attached by him?”, to which question the witness answered, “He did say so.” (*Ex. 9 B. of E.*)

### VIII.

The Court erred in permitting the witness, H. A. Day, called in rebuttal, to answer the following question, over the objection of defendant, to-wit:

(a) “Q. Mr. Day, you may state to the jury whether or not, on the 19th day of May, 1912, you, in company with Mr. Peter Vidovich, went to the United States Marshal’s office in Fairbanks, Alaska, and then and there had a conversation with Mr. Carlson, the Deputy United States Marshal, concerning the suit and the attachment therein, in the case of Paul Ringseth against Sam Vlik & Co., in the Commissioner’s court at Chatanika, before Sam Weiss, justice of the peace,”

to which the witness answered:

“A. Yes, we were there. I wouldn’t swear to the date positively, but it was about that time.” (*Ex. 10 B of E.*)

(b) “Q. Mr. Day, I will ask you whether or not, in the presence of you and Mr. Peter Vidovich only, that Mr. Brown, United States Deputy Marshal, at that time in your office, some time during the summer on the date which he testified to, when you were talking about this particular case of Paul Ringseth v. Sam Vlik & Co. and the attachment



thereunder sued out in the case before Commissioner Weiss, of Chatanika, in the Fairbanks Precinct, whether or not Mr. Brown said to you in substance that he (Brown) only attached 3 or 3½ cords of wood under this attachment, and that that was the small pile of wood, and that that was the place,—on the small pile of wood,—where he (Brown) posted the notice of attachment, and that that was all the wood that he (Brown) attached in that suit. I will ask you whether or not that was the substance of what Mr. Brown said to you and Mr. Vidovich at that time and place.”

to which the witness answered:

“A. He stated substantially that.” (*Ex. 11 B. of E.*)

#### IX.

The Court erred in denying defendant’s motion for instructed verdict, which motion was made by defendant after the testimony had closed. (*Ex. 12 B. of E.*)

#### X.

The Court erred in permitting the case to be submitted to the jury, over the defendant’s objection and motion for a directed verdict.

#### XI.

The Court erred in refusing to instruct the jury, as requested by the defendant, in the following particulars:

(a) In refusing to give the following part of defendant’s requested instruction No. II, as follows:

“or (2) the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, to the effect that the same is made in good faith, to secure the amount named therein, and without

any design to hinder, delay, or defraud creditors, and be acknowledged and filed in the office of the Recorder of the Precinct in which the property is situate, and be indexed in the record of chattel mortgages, and the original thereof retained by the said Recorder for the examination of all persons who may be interested therein." (*Ex. 13 B. of E.*)

(b) in modifying defendant's requested instruction No. III by adding thereto the following words:

"or was prevented from so doing by the possession or acts of the defendant." (*Ex. 14 B. of E.*)

(c) In refusing to give defendant's requested instruction No. IV, which reads as follows:

"I instruct you that, if you find that said alleged bill of sale, offered by the plaintiff in this case, was, in reality, intended as a chattel mortgage, and was not filed and indexed as such in the office of the Recorder, as required by law, then such mortgage is void and of no effect." (*Ex. 15 B. of E.*)

(d) In refusing to give defendant's requested instruction No. VI, which reads as follows:

"I instruct you that, in order for the plaintiff in this action to have acquired possession of the wood in controversy, after the entry of the judgments in the cases of Ringseth v. Vlik & Co., and McLean v. Vlik & Co., on the 24th day of May, 1912, it was necessary for him to take such actual possession thereof as would be notice to the world, and to this defendant in particular, that he was claiming and asserting a claim thereto, and, if you find that the plaintiff did not take such possession, between the time of the rendition of such judgments on the 24th day of May, 1912, and prior to the levy of the execution issued out of the Commissioner's Court at Chatanika, in the cases above mentioned, then the lien of said judgments, acquired by the levy of such executions,



is paramount and superior to any possession claimed by the plaintiff in this action, and the United States Marshal had the right to sell the property under the writs of execution in those cases.” (*Ex. 16 B. of E.*)

(e) In refusing to give defendant’s requested instruction No. VII, which reads as follows:

“You are instructed that, if at the time when the defendant levied the executions above mentioned, on the wood in controversy herein, the plaintiff herein was not in the actual possession of said wood, then the levy on said execution was properly made, and the defendant was entitled to hold said property thereunder. (*Ex. 17 B. of E.*)

(f) In refusing to give that portion of defendant’s requested instruction No. VIII, which reads as follows:

“And if you believe, from the evidence in this case, that the alleged bill of sale, offered by the plaintiff, was made by Sam Vlik & Co. to the plaintiff with the understanding that the same was made for the purpose of protecting the plaintiff, as against other creditors of Sam Vlik & Co., then I instruct you that the said transfer was fraudulent as against the plaintiffs in said actions, namely, as against Paul Ringseth and Jack McLean, and, if you so find, then your verdict in this action should be for the defendant. (*Ex. 18 B. of E.*)

(g) In refusing to give defendant’s requested instruction No. IX, which reads as follows:

“You are further instructed that every conveyance or assignment in writing, or otherwise, of any interest in lands or things in action, or any rents or profits issuing therefrom, and every charge on lands, goods, or things in action, or on the rents or profits thereof, made by any person with intent to hinder, delay, or defraud creditors, or other persons, of their lawful suits, demands, debts or damages, as against

the persons so hindered, delayed, or defrauded, is void, and if you find, from the evidence in this case, that Sam Vlik & Co. executed the bill of sale produced by plaintiff in this action with such intent, then your verdict should be for the defendant.” (*Ex. 19 B. of E.*)

(h) In refusing to give defendant’s requested instruction No. X, which reads as follows:

“You are further instructed that, if you find, from the evidence in this case, that the defendant was in the lawful possession of the wood in controversy, under and by virtue of the writs of attachment mentioned herein, from the 17th day of May, 1912, up to and including the 24th day of May, 1912, then, even though the attachment may have expired by operation of law, the possession was that of the defendant until said date, and if the plaintiff did not either enter into possession or take possession of said wood on or before the 25th day of May, 1912, when the execution in the case of Ringseth v. Vlik & Co. was levied, then the wood in controversy was in the legal possession of the United States Marshal, as alleged in defendant’s answer herein.” (*Ex. 20 B. of E.*)

(i) In refusing to give defendant’s requested instruction No. XI, which reads as follows:

“You are instructed that the judgments in the cases of Ringseth v. Sam Vlik & Co., and McLean v. Sam Vlik & Co. are valid judgments for the purposes of this case, and are binding on the plaintiff, and that the executions issued thereunder and said judgments kept in force the attachments in said actions, and the property levied on thereunder was at all times subject to the executions issued in said actions, and the plaintiff in said actions, by virtue of said attachments, had valid liens on the wood in controversy, from the 18th day of May, 1912, until



the time when the said property was sold under the executions issued therein." (*Ex. 21 B. of E.*)

(j) In refusing to give defendant's requested instruction No. XII, which reads as follows:

"You are instructed that the attachment liens of *Ringseth v. Vlik & Co.*, and *McLean v. Vlik & Co.* were not lost, destroyed, waived, or abandoned by the plaintiff in said actions, by reason of the failure of the Commissioner, in whose Court said actions were pending, to insert in said judgments an order foreclosing said liens, and that the words 'Let execution issue' were a sufficient order of foreclosure." (*Ex. 22 B. of E.*)

(k) In modifying defendant's requested instruction No. XIII, by inserting the following words:

"And if you also find that the plaintiff had previous knowledge of the fraudulent intent of *Vlik & Co.*" (*Ex. 23 B. of E.*)

(l) In refusing to give defendant's requested instruction No. XIV, which reads as follows:

"You are instructed that, if you find from the evidence that said alleged bill of sale, given to the plaintiff in this action on the 18th day of May, 1912, was in reality a chattel mortgage, and that said plaintiff actually took possession of said property under said said chattel mortgage, and actually held possession thereof, when said property was taken under the executions by the defendant in this action, in the cases of *Ringseth v. Vlik & Co.*, and *McLean v. Vlik & Co.*, you can not, under any circumstances, find a verdict in favor of the plaintiff in this action for a greater sum than the amount of the indebtedness which said alleged mortgage was given to secure; and, if you find the foregoing facts to be true, you can not, under any consideration, find for said plaintiff in a sum greater than the actual

market value of the wood so seized by the defendant, as proved by the evidence in this case.” (*Ex. 24 B. of E.*)

(m) In refusing to give defendant’s requested instruction No. XVI, which reads as follows:

“You are further instructed that the evidence in this case conclusively shows that Paul Ringseth and Jack McLean are judgment creditors of Sam Vlik & Co., and that, if the bill of sale offered by the plaintiff was made for the purpose of hindering and delaying them in the collection of their just debts and demands, then your verdict must be in favor of the defendant.” (*Ex. 25 B. of E.*)

(n) In refusing to give defendant’s requested instruction No. XVII, which reads as follows:

“You are instructed that, if you should find, from the evidence, that the possession of the defendant under the attachment liens above referred to was lost by the failure of the defendant to have the attachment foreclosed in the judgments above mentioned, and that thereafter the defendant acquired a valid lien under the executions hereinbefore mentioned, then his possession, so obtained, would be valid, unless the plaintiff had actual possession and control of said personal property.” (*Ex. 26 B. of E.*)

to all of which rulings, the defendant excepted.

## XII.

The Court erred in instructing the jury in the following particulars:

(a) In instructing the jury as set forth in instruction No. IX, which reads as follows:

“And, if you find from the evidence in this case that the bill of sale offered by the plaintiff was intended as a chattel mortgage, then I instruct you that the said mortgage is void as to prior creditors



in good faith for value, unless the plaintiff in the action entered into the actual possession of such property and retained possession thereof, or unless you find that he was prevented from so doing by the possession or acts of the defendant.” (*Ex. 27 B. of E.*)

(b) In instructing the jury as set forth in instruction No. XI, which reads as follows:

“You are instructed that where absolute ownership is claimed and only special property in the thing claimed is shown—as would be the case if the plaintiff instead of showing absolute ownership should show a conditional sale, or this bill of sale operated as a chattel mortgage—that that is sufficient to sustain a recovery, provided that it also appear that the plaintiff has the right of immediate possession of the property.” (*Ex. 28 B. of E.*)

(c) In instructing the jury as set forth in instruction No. XII, which reads as follows:

“You are instructed that property may be sold or mortgaged subject to the lien of an attachment, and the sale or mortgage becomes absolute when the lien of the attachment is removed or lost.” (*Ex. 29 B. of E.*)

(d) In instructing the jury as set forth in instruction No. XIII, which reads as follows:

“You are instructed that the judgments given in the Commissioner’s Court at Chatanika on May 24, 1912, that have been introduced in evidence in this case, did not contain any order that the property attached theretofore in the actions in which said judgments were given should be sold to satisfy the demands of the plaintiffs in said actions, and that therefore as a matter of law said plaintiffs waived and lost any lien theretofore secured upon the property in question by reason of the attachments there-

tofore issued in said actions, and that the defendant was not therefore longer entitled to the possession of said property under said writs of attachment, if you should find that they had been theretofore duly levied." (*Ex. 30 B. of E.*)

(e) In instructing the jury as set forth in instruction No. XIV, which reads as follows:

"And you are further instructed that if you find that the plaintiff had become the owner of said wood and entitled to the immediate possession thereof prior to the date of the levy thereon by the defendant under the writs of execution (evidence of which has been given before you), by reason of the bill of sale to the plaintiff from Sam Vlik & Company, then the defendant was without right to hold such property under such levies, or to sell or dispose of the same." (*Ex. 31 B. of E.*)

(f) In instructing the jury as set forth in instruction No. XV, which reads as follows:

"You are instructed that if you find by a preponderance of evidence that on May 18th, 1912, Sam Vlik & Company was indebted to the plaintiff in the sum of seventeen hundred and twenty dollars, or any other substantial sum, and, that in consideration of such indebtedness, and without intent to hinder, delay or defraud the creditors of said Vlik & Company, or without previous knowledge of such intent on the part of the plaintiff, then executed and delivered to the plaintiff the bill of sale of said property; and, if you further find by a preponderance of evidence that the plaintiff thereupon acquired the right to the immediate possession of said property, and that plaintiff did on or about May 18, or at any time before the levy of the executions herein mentioned, take possession of said wood, or notify the defendant of his claim of ownership and right of possession thereof, or that the defendant was otherwise



notified of such ownership and right of possession, then you are instructed that the levy or attempted levy under such writs of execution was without authority, and that the defendant did not thereby secure any right to hold such wood under such levy, or to sell the same thereunder." (*Ex. 32 B. of E.*)

(g) In giving that part of instruction No. XVI which reads as follows:

"Provided that you further find that the plaintiff had previous knowledge of the fraudulent intent of said Vlik & Company." (*Ex. 33 B. of E.*)

(h) In giving that part of instruction No. XIX which reads as follows:

"And if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Company." (*Ex. 34 B. of E.*)

(i) In instructing the jury as set forth in instruction No XX, which reads as follows:

"You are instructed that if you find from the evidence that said alleged bill of sale given to plaintiff in this action on the 18th day of May, 1912, was in reality a chattel mortgage, and that the plaintiff actually took possession of the property under said chattel mortgage and actually held possession thereof when said property was taken under execution by the defendant in this action in the case of Paul Ringseth v. Sam Vlik and Company and Jack McLean v. Sam Vlik & Company, you can not under such circumstances find a verdict in favor of the plaintiff in this action for a greater sum than the amount which said alleged mortgage was given to secure; and, if you find the foregoing facts to be true, you can not under any circumstances find for the plaintiff in a sum greater than the actual market value of the wood so seized by defendant at the time and place of such seizure as proved by the evidence in this case." (*Ex. 35. B. of E.*)

### Argument.

Section 550, Compiled Laws of Alaska, provides as follows:

“Sec. 550. All deeds of gift, all conveyances, and transfers of assignments, verbal or written, of goods and chattels or things in action, made in trust for the person making the same, shall be void as against the creditors, existing or subsequent, of such person.”

Section 556, Compiled Laws of Alaska, provides as follows:

“Sec. 556. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded shall be void.”

Section 1875, Compiled Laws of Alaska, provides as follows:

“Sec. 1875. Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed *prima facie* to be a fraud against the creditors of the vendor or assignor, and subsequent purchasers in good faith and for a valuable consideration, during the time such property remains in the possession of said vendor or assignor.”

Section 740, Compiled Laws of Alaska, provides as follows:



“Sec. 740. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value, unless—

“(1) The possession of such property be delivered to and retained by the mortgagee; or

“(2) The mortgage provide that the property may remain in the possession of the mortgagor and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent from the precinct when such mortgage is executed, at the time of the execution thereof, an affidavit of those present and of the agent or attorney in fact of such absent party that the same is made in good faith to secure the amount named therein, and without any design to hinder, delay, or defraud creditors, and be acknowledged and filed as hereinafter provided.”

Section 741, Compiled Laws of Alaska, provides as follows:

“Sec. 741. Subject to the provisions of the next preceding section, one member of a firm of general partners may alone execute a mortgage of personal property and make the affidavit therein required on behalf of the firm, and the mortgage so executed and the affidavit so made is as valid as if executed and made by all the partners or their agent or attorney in fact. In case of a corporation the president, secretary, or managing agent thereof may make the affidavit on its behalf.”

Section 743, Compiled Laws of Alaska, provides as follows:

“Sec. 743. Every mortgage of personal property, together with the affidavits of the parties thereto or a copy thereof, certified to be correct by the person before whom the acknowledgment has been made, must be filed in the office of the recorder of the precinct where the mortgagor resides, and of the pre-

cinct where the property is at the time of the execution of the mortgage, or, in case he is not a resident of the district, then in the office of the recorder of the precinct where the property is at the time of the execution of the mortgage; and the recorder must, on receipt of such mortgage or copy, indorse thereon the time of receiving the same, and file and keep the same in his office for the inspection of all persons, and shall enter in a book, properly ruled and kept for that purpose, the names of all the parties—the names of the mortgagors to be alphabetically arranged,—the consideration thereof, the date of its maturity, and the time of filing the same.”

Section 746, Compiled Laws of Alaska, provides as follows:

“Sec. 746. Personal property mortgaged may be taken on attachment or execution issued at the action of a creditor of the mortgagor; but before the property is so taken the officer must pay or tender to the mortgagee or the assignee thereof the amount of the mortgage debt and interest, or must deposit the amount thereof with the recorder of the precinct in which the mortgage is filed, payable to the order of the mortgagee or the assignee thereof; and when the property then taken is sold under process the officer must apply the proceeds of the sale as follows:

“(1) To the repayment of the sum paid to the mortgagee or the assignee of said mortgage, with interest from the date of such payment; and

“(2) The balance, if any, in like manner as the proceeds of sale under execution are applied in other cases.”

Section 748, Compiled Laws of Alaska, provides as follows:

“Sec. 748. The provisions of the foregoing sec-



tions of this chapter shall extend to all such bills of sale, deeds of trust, and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or lien upon such property."

Sec. 972, Compiled Laws of Alaska, provides as follows:

"Sec. 972. The marshal or deputy marshal to whom the writ is delivered shall execute the same without delay, as follows:

"First. Real property shall be attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the marshal.

"Second. Personal property capable of manual delivery to the marshal, and not in the possession of a third person, shall be attached by taking it into his custody.

"Third. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of the same, or if it be a debt, then with the debtor, or if it be rights or shares in the stock of an association or corporation, or interest or profits thereof, then with such person or officer of such association or corporation as this code authorizes a summons to be served upon."

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## I.

**THE ALLEGED TRANSFER BY SAM VLIK & CO. IN BEHALF OF VLIK & CO. WAS A VOLUNTARY TRANSFER, WITH A SECRET RESERVATION IN FAVOR OF THE GRANTOR, MADE WITHOUT THE KNOWLEDGE AND CONSENT OF ALL THE COPARTNERS, AND CREATED NO LIEN AS AGAINST A PRIOR OR SUBSEQUENT ATTACHING OR EXECUTION CREDITOR.**

See *Wilcox et al. v. Jackson*, 4 Pac., 966 (971-976).

(a) Sam Vlik alone executed the alleged bill of

sale (Plaintiff's Exhibit A, Tr. pp. 22-24), without the knowledge or consent of his copartner Dan Vlik (Tr. p. 45), and without the consent and probably without the knowledge of his copartner Mike Onak (Tr. p. 38), who first says that he first heard of the bill of sale on the night of May 18, 1912, and afterwards, that Sam Vlik told him on the night of the 17th of May, 1912, that he intended to make the bill of sale. Both members of the copartnership were working at the time.

(b) A secret trust in favor of transferer was reserved (Tr. p. 32).

(c) Transferee knew that he was securing a preference and that Vlik & Co. were insolvent (Tr. p. 32).

(d) The pretended transfer was of practically all the copartnership property, and broke up their operations.

"There is no small difficulty," says Mr. Justice Story, "in supporting the doctrine, even under qualifications, that one partner may make a general assignment of all the partnership property, so as to break up its operations."

Story on Partnership, Sec. 101;

See also 30 Cyc., 495 (iv);

Osborne v. Barge, 29 Fed., 725.

Sam Vlik & Co. were a mining copartnership and the selling of their principal, and practically only, asset could not by any stretch of the imagination be treated as the performance of an act within the usual scope of the firm business.

For authority of one member of the partnership to dispose of practically all the firm property, see:

2 Kent's Com., 14th ed., p. 60 (\*page 46);

30 Cyc., 495;

George on Partnership, pp. 213-214.



## II.

THE ATTACHMENT LEVIED BY THE DEFENDANT UNITED STATES MARSHAL WAS A VALID LEVY, AND THE WOOD IN CONTROVERSY WAS IN HIS POSSESSION AS UNITED STATES MARSHAL AT THE TIME THE ALLEGED BILL OF SALE WAS EXECUTED, AND PLAINTIFF ALLEGES THAT HE TOOK POSSESSION OF THE WOOD AND PLAINTIFF COULD NOT ACQUIRE POSSESSION THEREOF.

The actions of *Ringseth v. Vlik & Co.* and *McLean v. Vlik & Co.* were both instituted before midnight of May 17, 1912, and the alleged bill of sale was not executed until between 10 a. m. and 11 a. m. on May 18, 1912, and the plaintiff made no attempt to take possession of the wood until the night of May 18, 1912, after the two attachments above mentioned had been levied.

Subdivision 3, Section 972, Compiled Laws of Alaska, *supra*, sets forth explicitly how bulky articles shall be attached, and is as follows:

“Third. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of the same,” etc.

It is undisputed that Deputy Marshal Brown served writs of attachment upon and delivered copies thereof to Dan Vlik, a member of the firm of Vlik & Co., who was on the ground and in possession of the wood, thus complying with the section last quoted. Plaintiff by his pleadings admits a valid seizure of *three* cords of wood, so the statement of Brown that he posted notices of attachment must be taken as true, and his statement that

he set forth in his notices that he attached *200 cords more or less* is not disputed. He placed Ringseth, who lived near the wood and in sight thereof, in charge as keeper (Tr. p. 65), and the keeper visited the wood every day and delegated to McLean some authority and had McLean, who was on the ground at the time, watch the wood.

In discussing the manner in which a levy of attachment should be made, Mr. Shinn, in Volume 1 of his work on Attachment and Garnishment, at page 391, says:

“To make a valid and effective levy as against subsequent attaching creditors, the general rule of law founded upon the principles of evidence and policy, requires a change of possession and the actual removal of the property attached, but where the removal would be attended with great waste and expense, it may be dispensed with. The officer must, in such case, exercise due vigilance to prevent it from going out of his control, although it is not necessary that there should be a continual presence of himself or his agent with the property. \* \* \* To constitute a valid operative levy, the officer should do such act as to amount to a change of possession, or be equivalent to a claim of dominion, coupled with a power to exercise it. He must obtain actual control with power to remove it. The possession acquired and maintained and the custody and control exercised must be such as will give timely and unequivocal notice thereof. And if this be done it will be sufficient, without a manual taking of the property.”

“If the articles are so ponderous as not to be susceptible of removal conveniently, many statutes require that the officer or his agent must not only continue to exert control over it, but that some notice must be posted or filed or recorded, or that a



copy of the writ of attachment must be left or filed with a specified officer, such act being considered by the statute sufficient to give constructive notice to third persons of the levy made thereon." (Id. 403.)

See Sec. 972 Comp. Laws of Alaska.

"He (U. S. Marshal) may employ an agent or a receptor for this purpose (retaining possession), whose possession will be the possession of the officer \* \* \*. If he leave them in the possession of some one (other than the debtor) who acts for him, it will be sufficient, the purpose being to give notoriety to the attachment." (Id. 508.)

The defendant in the case at bar had the right to appoint the plaintiff in the action as custodian of the property.

Shinn on Attachment, Volume 1, Page 511, says:

"There seems to be no objection to making the attaching creditor a keeper of the property if he is a responsible man and willing to undertake the trust. And no fraud will be presumed thereby. Such plaintiff, however, holds possession as a servant of the officer, and not in his own right, for he has no right to control the possession of attached property during the pendency of the attachment."

In discussing the force of such a lien, Mr. Shinn says:

"The defendant cannot impair the attaching creditor's lien by divesting himself of the property; nor can the subsequent rights acquired by third persons affect it in any way." (Id. 617.)

## III.

THE PLAINTIFF PAVLOVICH WAS NEVER IN POSSESSION OF THE WOOD IN CONTROVERSY AND DID NOT ACQUIRE OR EXERCISE DOMINION OVER OR CONTROL THEREOF CONTINUOUSLY, OR AT ALL, AND HIS ALLEGED ACTS OF TAKING POSSESSION WERE NOT EFFECTIVE AS AGAINST SUBSEQUENT ATTACHING OR EXECUTION CREDITORS.

The only acts alleged to have been performed by plaintiff in asserting ownership over the wood in controversy were the alleged posting of notices thereon on May 18, 1912, and the measuring of the wood a few days later, at which times the wood was in the custody and control of the defendant United States Marshal, and during all of which time two members of the firm of Vlik & Co. were still on the ground, occupying the buildings thereon (Tr. pp. 51-52), and the United States Marshal's notices remained posted on the wood and a keeper was in charge thereof.

The recording of a bill of sale of the property is ineffective for any purpose whatsoever, as there is no law in Alaska for the recording of a bill of sale of personal property, as the only evidence of change of title, so far as third persons are concerned, is the immediate and continuous actual change of possession.

See *Allan v. Steiger*, 31 Pac., 226-227;

*Guthrie v. Carney* (Cal.), 124 Pac., 1045.

In the case last cited, the Court, on page 1048, says:

"Immediate delivery was imperatively necessary under the statute in order to constitute a sale which would be valid in the eyes of the law and protected



from the claims of creditors. This is so, even though the creditors had acquired no rights by attachment or execution previous to a delivery which may have been actual, but which did not immediately follow the sale."

Citing *Howe v. Johnson* (Cal.), 40 Pac., 42;

*Ruggles v. Cannedy* (Cal.), 53 Pac., 911.

In the case at bar, if Pavlovich had taken *constructive* possession of the property and was *constructively* in possession thereof continuously from the time of such sale until the execution was levied (conceding for the sake of argument that the attachment lien was lost by failure to foreclose same by judgment), then the levy of the execution by the United States Marshal was valid.

"The purchaser must take actual, open and unequivocal possession, which must be continuous and substantial; the word 'actual' excluding the idea of a mere formal change of possession, and the word 'continued' excluding the idea of a mere temporary change."

*Taylor v. Malta Mercantile Co.* (Mont.), 132 Pac., 550;

*Dodge v. Jones* (Mont.), 14 Pac., 707;

*Stevens v. Erwin*, 15 Cal., 503.

The bill of sale to Pavlovich not being notice to the defendant United States Marshal of any change of title, and no possession having been taken or maintained by Pavlovich, the execution levied by the defendant United States Marshal was valid, even though he might have known of the claim of Pavlovich, of which fact no evidence appears.

*Allan v. Steiger*, *supra*.

There is no evidence showing that the United States Marshal ever had any notice of the claim of Pavlovich until after the levy of the execution or prior to the date of sale. Hence, the levy was valid.

Ray v. Raynolds (Cal), 9 Pac., 15.

If Pavlovich posted the notices alleged by him to have been posted, and by virtue thereof acquired any possession of the property, it was a concurrent or joint possession with the vendor (if the United States Marshal's possession, by virtue of his attachment, was entirely ignored), and such concurrent or joint possession is void.

Bassinger v. Spangler (Colo.), 10 Pac., 809;

Cook v. Mann, 6 Colo., 21;

Donovan v. Gathe (Colo.), 32 Pac., 436;

Atchison v. Graham (Colo.), 23 Pac., 876-877.

In the case last cited, the Court says, on page 879:

"To satisfy the statute, the possession of the vendee or mortgagee after default must be exclusive. He must exercise exclusive dominion and control over the property. Such dominion cannot be shared with the vendor or mortgagor. If the property is capable of manual delivery, it must be removed and taken from the possession of the vendor, or it must be so dealt with as to give notice to the community that there has been a change of ownership. If, to accomplish this end and satisfy the statute, it is necessary to remove the property from the place where it has been kept, such removal must be made, however great the expense or hardship may be. The change of possession must not only be actual, as between the parties, but apparent to the community."

In the case at bar no effort was made by Pavlovich to remove the wood from the ground, or to secure the pos-



session thereof from the United States Marshal or his keeper.

On the general question as to what constitutes a sufficient delivery of personal property to satisfy the statute, see:

*Sweeney v. Coe et al.*, (Colo.), 21 Pac., 705;

*Austin et al. v. Terry* (Colo.), 88 Pac., 189-190, and cases there cited;

*Springer v. Kreuger* (Colo.), 34 Pac., 269-271, and cases there cited.

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#### IV.

PAVLOVICH KNEW THAT THE ALLEGED TRANSFER TO HIMSELF FROM SAM VLIK WAS MADE FOR THE PURPOSE OF HINDERING AND DEFRAUDING THE OTHER CREDITORS OF SAM VLIK & CO., AND SAID TRANSFER WAS VOID, EVEN THOUGH A FULL CONSIDERATION HAD BEEN PAID FOR THE PROPERTY SO ATTEMPTED TO BE CONVEYED.

*Helm v. Brewster*, (Colo.), 93 Pac., 1101.

In the case last cited, the Court says:

"The sale of property, though for a full consideration, made by the owner with intent to hinder, delay and defraud his creditors, if the vendee participated in such intent, is void as against such creditors. A grantor's intent to hinder, delay and defraud his creditors may be inferred from facts and circumstances."

The testimony shows that Pavlovich knew that Vlik & Co. were having financial difficulties and would not be able to go ahead with their mining, and, as he is presumed to be possessed of ordinary intelligence, knew that the

transfer of the wood to him would be a transfer of practically the only available asset from which the creditors of Vlik & Co. could realize anything in satisfaction of their claims. Consequently, he accepted the transfer with the knowledge that it would hinder and delay Vlik & Co.'s creditors.

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## V.

**THE DEFENDANT WAS ENTITLED TO INTRODUCE EVIDENCE TO SHOW THAT THE JUDGMENTS OBTAINED IN THE CASES OF RINGSETH V. VLIK & CO. AND McLEAN V. VLIK & CO. WERE NOT ENTERED UNTIL ONE HOUR AFTER THE TIME DEFENDANTS WERE CITED TO APPEAR IN COURT.**

Counsel realizes that it is not necessary to pass upon the question presented by the exception taken to the Court's ruling on the matter presented under this head, as the judgment was admitted in evidence without that proof, on the ground that it was not subject to collateral attack. But it is respectfully urged that the ruling of the Court on the question involved would be appreciated by the Bench and Bar of Alaska, where the matter has been often presented in the past, and doubtless will be frequently presented in the future, owing to the fact that many of the Commissioners and ex-officio Justices of the Peace are not lawyers, and are far removed from the larger towns, where they might receive some legal advice in the matter—where they err through ignorance of the form, but are correct in principle. And it is submitted that in the case at Bar that the chief difficulty has



arisen over the unintentional omission by the Commissioner from his judgment of the words necessary to foreclose the attachment lien.

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## VI.

THE COURT SHOULD HAVE DIRECTED A VERDICT IN FAVOR OF THE DEENDANT UNITED STATES MARSHAL AT THE CLOSE OF THE CASE, AS REQUESTED BY THE DEFENDANT.

See *Israel, U. S. Marshal, v. Day* (Colo.), 92 Pac., 698.

The alleged sale was fraudulent by reason of the fact, among others, that a secret trust was reserved in favor of the vendor, Sam Vlik & Co. (Tr. p. 34).

Comp. Laws of Alaska, Sec. 550.

The alleged bill of sale was not valid as a mortgage of chattels, as provided in Section 740 of the Compiled Laws of Alaska, for the reason (1) that there was no affidavit of merits, nor provision for the retention of possession by mortgagor, nor filing as a chattel mortgage; and (2) there was not a *delivery* of possession by the vendor and a continuous actual change of possession, for delivery of possession to vendee was impossible, the United States Marshal being in possession, and as far as the community was concerned, two members of the vendor copartnership remained in possession of the ground where the wood was piled, and there was no visible or actual change of possession apparent to the community.

See *Israel, U. S. Marshal, v. Day*, *supra*, p. 699.

A general creditor is not estopped from attaching prop-

erty covered by a chattel mortgage, which has not been duly filed, even though he had actual knowledge of the existence of such mortgage.

Greenville National Bank v. Evans-Snider-Buel Co., (Okla.), 60 Pac., 249.

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## VII.

### THE INSTRUCTIONS PROPOSED BY THE DEFENDANT AND REJECTED BY THE COURT SHOULD HAVE BEEN GIVEN.

It is respectfully submitted that defendant's proposed instructions VI (Tr. p. 149); VII (Tr. p. 150); X (Tr. p. 151), and XVII (Tr. p. 154) correctly set forth the law applicable to the rights of the defendant United States Marshal in the case at bar.

Also that the modification of defendant's proposed instruction III (Tr. pp. 109-149) was erroneous, as it ignores the right of the defendant to take possession under a valid attachment prior to any assertion of title by the plaintiff.

We further respectfully submit that defendant's proposed instructions on the substantive law (c), (f), (g), (l) (Tr. pp. 149-154), should have been given, and the modifications to the instructions asked were erroneous.

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## VIII.

### THE INSTRUCTIONS GIVEN BY THE COURT WERE IN PART ERRONEOUS OR MISLEADING.

Instruction IX (Tr. p. 154) in effect holds that the defendant United States Marshal could secure no pos-



session paramount to the rights of mortgagee, contrary to the rule that the attachment levied on mortgagor's property prior to recording of mortgage, without knowledge, is superior to rights of mortgagee.

Instruction XI (Tr. p. 155) is erroneous and misleading when applied to a case of conversion, and if proper at all would be more appropriate in a replevin action.

Instruction XIII (Tr. pp. 121; 155) is misleading, for while the United States Marshal might have no rights under the attachment writ, he might secure possession under a valid execution writ.

Instructions XII (Tr. p. 155) and XIV (Tr. p. 156) are misleading, as neither one takes into consideration the essential elements of a valid sale of personalty in Alaska, to-wit, the *actual and continued change of possession* and the further requisite that the possession must be *open and notorious*, and the mere *right* of possession is not sufficient.

See cases cited under Par. III, this brief.

Instruction XV (Tr. p. 156) is in conflict with the direct provisions of Secs. 740, 746 and 1875, Comp. Laws of Alaska, Supra., making an *inchoate right of possession* the *only requisite* to the securing of a title *superior to the rights acquired by attaching creditors in ignorance of the existence thereof*.

Modification of Instruction XVI (Tr. pp. 122; 157) by addition of the last three lines thereto, is misleading, as it fails to recognize the rights acquired by the attaching creditors before the alleged transfer was made, and

in effect holds that under no considerations could the Marshal be justified in attaching the property of the grantor.

Instruction XIX (Tr. pp. 123; 157) is erroneous, for the Court, by the addition of the last three lines, absolutely nullifies the balance of the instruction and it is directly opposed to provisions of Sec. 1875, Comp. Laws of Alaska. *Supra*.

The instruction, down to the last three lines, correctly describes a fraudulent conveyance without possession taken by vendee, leaving the property open to attachment by vendor's creditors, and then the instruction wipes out the previous instruction and makes the matter entirely dependent upon the knowledge by vendee of fraudulent intent of vendor.

In the case at bar, the defendant as a United States Marshal in and for the Fourth Division of the Territory of Alaska, in fulfillment of his duties imposed by law, under two writs of attachment issued out of a Justice Court, attached certain property and held possession thereof in the manner required by the statutes of Alaska. Through no fault or error on his part, the Justice of Peace, before whom the cases were tried, failed to foreclose the attachment lien when judgment was entered by default. The United States Marshal thereafter, under writs of execution issued in said cases, seized and sold the property in due course, and there is no objection made to his method of so doing.

The wood was purchased by the judgment cred-



itor. The plaintiff, at the time of the sale, notified creditor. The plaintiff, at the time of the sale, notified the Marshal that he claimed the wood, but made no attempt before that time to give notice to the Marshal that he had any claim in or to any part of it. He did not institute an action in replevin to recover the property, which counsel contends was his remedy, but relying upon the bond given by the United States Marshal, now attempts to mulct the United States Marshal in damages by reason of the performance of his duties as imposed by law. If plaintiff was the owner of the wood, his rights therein could have been determined by an ordinary action of replevin, which would have held the wood itself, and the rights of the parties could have been fully adjudicated therein without compelling the United States Marshal to go to the expense of defending an official act, performed in the due course of business.

It is respectfully suggested that from the evidence it clearly appears that Sam Vlik entered into some sort of an understanding with his fellow-countryman, Pavlovich, whereby Pavlovich would pose as the real owner of the wood and should sell same and return at least a part of the funds realized therefrom, not to the partnership itself, but to Sam Vlik individually, who, immediately after making the alleged transfer, disappeared from the scene and returned to Russia, where he doubtless feels safe from any pursuit by his creditors. It also appears from the evidence that a cleanup was had on the mine operated by Sam Vlik & Co. on May 17, and it is only reasonable to presume that, as the creditors were not

paid, the cleanup of gold dust departed in company with Sam Vlik. It is therefore submitted that, from all the evidence, the Court should have granted the motion made by the defendant for a directed verdict, for plaintiff's position as a *bona fide* purchaser for value is not sustained by the evidence, but, on the contrary, it is obvious from the evidence that it was a part of Sam Vlik's scheme to defraud his creditors. Furthermore, the alleged bill of sale was not intended to fully transfer the title to the property, but to reserve a secret trust for Sam Vlik, and if it was treated as a mortgage, it is void for want of proper execution and recording, and failure on the part of Vlik & Co. to deliver possession to the mortgagee of the property described therein, and for the further reason that mortgagee failed to retain possession thereof and that no possession was ever taken by Pavlovich, such as is contemplated by the statute.

The transfer might be sustained between Sam Vlik and Pavlovich, but as between the creditors of Sam Vlik & Co. and Pavlovich it is not sufficiently removed from the class of sales denounced by the statute as fraudulent.

WHEREFORE, the Plaintiff in Error prays that the judgment be reversed and that the lower Court be directed to render judgment in favor of the defendant.

Respectfully submitted,

McGOWAN & CLARK,

Attorneys for Plaintiff in Error.

Dated Fairbanks, Alaska,

August 29th, 1914.





No. 2422.

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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H. K. LOVE, United States Marshal,

*Plaintiff in Error,*

VS.

VASO PAVLOVICH,

*Defendant in Error.*

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**BRIEF OF DEFENDANT IN ERROR.**

H. A. DAY and  
MORTON E. STEVENS,  
Fairbanks, Alaska,  
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*Filed this.....day of....., 1914.*

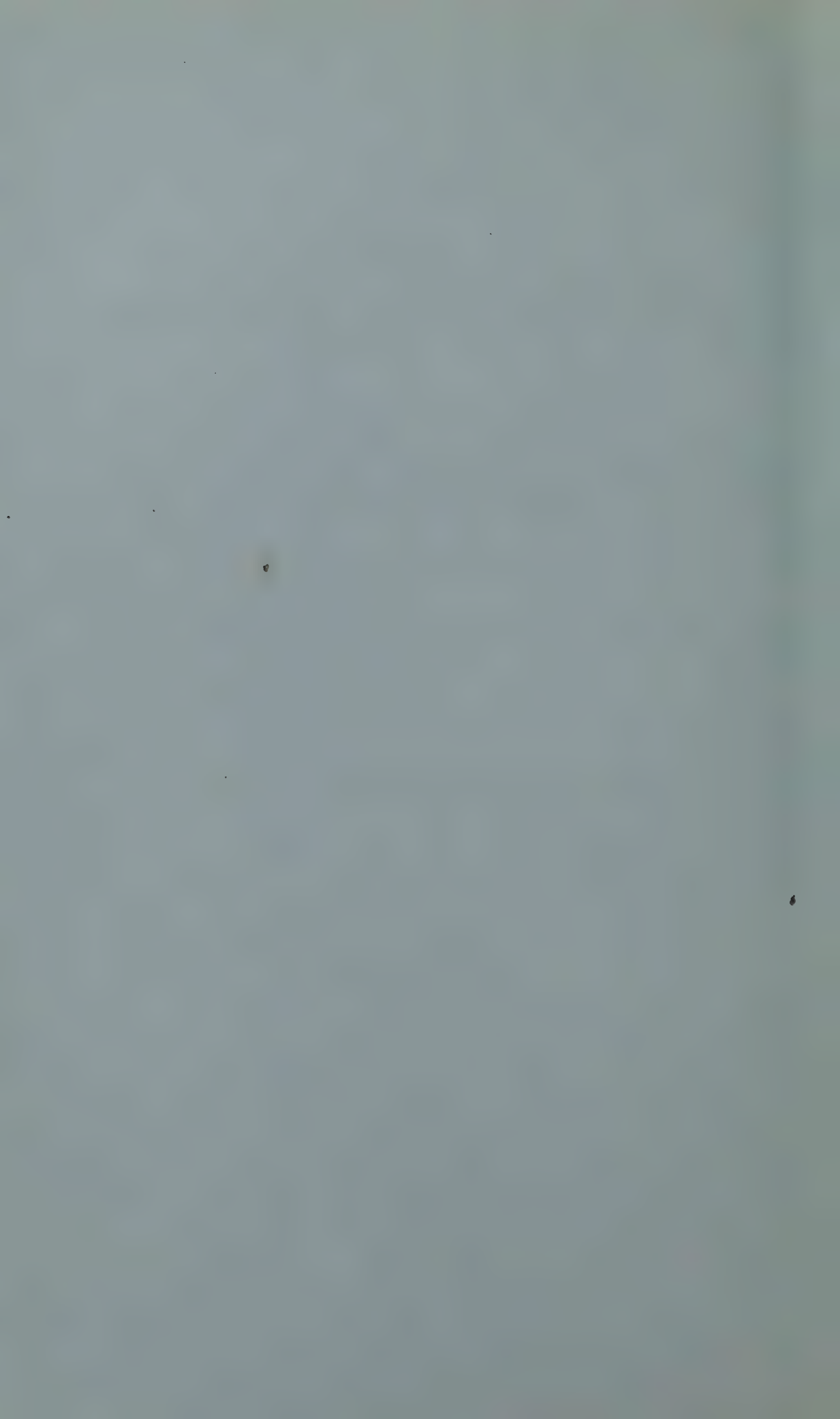
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*Clerk.*

By ..... NOV 7 - 1914 ..... *Deputy Clerk.*

F. D. Monckton,  
Clerk.





No. 2422.

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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H. K. LOVE, United States Marshal,

*Plaintiff in Error,*

VS.

VASO PAVLOVICH,

*Defendant in Error.*

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**BRIEF OF DEFENDANT IN ERROR.**

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**Statement.**

This action was commenced in the District Court, Territory of Alaska, Fourth Division, by Defendant in Error against Plaintiff in Error herein for the wrongful conversion upon the part of defendant below, as United States States Marshal, of two hundred (200) cords, more or less, of wood belonging to plaintiff.

This wood, May 17th, 1912, was the property of Sam Vlik & Company, a copartnership composed of Sam Vlik, Dan Vlik and Mike Onak, who were then engaged in placer mining. This particular wood had, theretofore, been purchased by Sam Vlik & Company from plaintiff,



Vaso Pavlovich, besides other wood, which had been used by said purchasers in their mining operations. By reason of said sale of said wood, and the furnishing by Pavlovich to Sam Vlik & Company certain horse feed and freight money thereon, the said Sam Vlik & Company was on the 17th and 18th of May, 1912, and for a long time prior thereto, had been indebted to plaintiff in the sum of Seventeen Hundred Twenty Dollars (\$1720.00) (Tr. pp. 19-20).

On the evening of May 17th, Sam Vlik went to plaintiff and told him that he could not pay him any money, but that if he would accompany him to town, he would give him a bill of sale to this wood in controversy (Tr. pp. 21, 22, 29). Whereupon they came to town and on May 18th, 1912, Sam Vlik & Company, by Sam Vlik, made, executed, acknowledged and delivered to plaintiff a bill of sale to said wood, which bill of sale is absolute in form and recites a consideration of Two Thousand Dollars (\$2,000.00) (Plaintiff's Exhibit "A", Tr. pp. 22-23). Sam Vlik had authority to execute for the firm this instrument. Mike Onak, one of said firm, testified that the same was given to pay for the wood and horse feed owed to plaintiff (Tr. pp. 37-38), and further testified that Sam Vlik had told witness, the night before, that he was going to town to give Pavlovich a bill of sale to this wood (Tr. p. 38). Dan Vlik, the third member of said firm, testified that Sam Vlik was the manager of the partnership and run the business and had the authority to give this bill of sale (Tr. p. 45), and on said page states the object of said bill of sale, the same

being to cancel said debt.

Plaintiff caused notices to be made by Judge Dillon, who made out the bill of sale, which notices claimed this wood to be the property of plaintiff, and that he, the plaintiff, in the evening of May 18th, 1912, posted four (4) of said notices on the wood in controversy in conspicuous places, to-wit: one notice on each of the four (4) corners thereof (Tr. pp. 24, 25, 42, 43).

By reason only of the testimony of plaintiff on cross-examination, appearing on page 34, Tr., the plaintiff in error herein contends that this bill of sale was in fact a mortgage, and inasmuch as actual, immediate, and notorious possession was not taken, that the mortgage would be void as against plaintiff in error, because the instrument in writing did not contain a clause providing for the mortgagor to retain possession, and that the same was not filed or indexed as a chattel mortgage.

The testimony of plaintiff on 'cross-examination referred to, we contend, is not sufficient to change the character of this instrument from a bill of sale to a mortgage, but whether the same is a bill of sale or a mortgage, the fact of putting up these notices and subsequently measuring the wood, constituted the taking of possession as much as the nature of the property and the conditions would permit (Tr. pp. 25, 34, 35, 42, 43).

May 17th, 1912, two actions for debt against Sam Vlik & Company were commenced in the Justice of the Peace or Commissioner's Court at Chatanika, one by Paul Ringseth and the other by Jack McLean. Summonses were issued and made returnable May 24th at the hour

of two P. M. and three P. M., respectively. Writs of attachment were issued, and on said 17th day of May said summonses and writs were served upon Sam Vlik & Company, and according to the Marshal's return and the testimony of the Deputy Marshal, the wood in controversy was, on the night of May 17th or the morning of the 18th of May, 1912, attached by taking the same into custody by said Deputy Marshal, who thereupon claims to have placed the custody of said property with said plaintiff Ringseth, but states that said appointment was not in writing, and that he, the said Deputy, was not sure whether he appointed said Ringseth custodian or whether the Justice of the Peace or Commissioner made the appointment (Tr. pp. 68, 97). Ringseth, plaintiff in one of said Justice of the Peace cases, who claimed to act as custodian as aforesaid, testified that he looked after said property (in a general way) and left the matter, at least a portion of the time, with plaintiff in the second Justice Court suit, Jack McLean (Tr. pp. 94, 97, 98, 99, 100). Said Deputy Marshal claims to have posted notices of attachment upon said wood (Tr. pp. 59 to 63). Plaintiff admits in his pleadings and contended at the trial that defendant attached only three (3) or three and one-half ( $3\frac{1}{2}$ ) cords of wood which was in a small and separate pile from the wood in controversy (Tr. pp. 16, 67, 68, 69). The evidence upon this subject as contended for by defendant consists in the testimony of Lysle Brown, Deputy Marshal (Tr. pp. 59 to 63), and the said Deputy Marshal's return upon the writs (Tr. pp. 59, 60 and 66, Defendant's Exhibits 2 and 5). The



testimony of said Deputy Marshal was in part impeached by the witness H. A. Day (Tr. pp. 103-104), and by the testimony of Peter Vidovich (Tr. pp. 100-103).

May 24th, 1912, judgments were entered in said two cases by default, and the records show that the judgment in the Ringesth case was entered at two o'clock P. M. of said date, the same being the return hour and day of the summons (Tr. pp. 70, 71, 74), and that the judgment in the McLean case was entered at three o'clock P. M. (Tr. p. 75) of said date, the same being the return day and hour as directed in said summons. The Justice of the Peace, therefore, did not wait an hour in either case before entering judgment as is required by the statute of Alaska (Compiled Laws of Alaska, Section 1844).

The Justice of the Peace, also, in entering said judgments, failed to foreclose the attachment liens and failed to incorporate an order providing for the sale of the attached property as required by the statute (Compiled Laws of Alaska, Section 979).

Defendant in error contends that each of said judgments is void, and that the executions issued thereon, as well as the sales of said property thereunder, are void. Defendant in error further contends that even if such judgments were not void, that the failure to foreclose any attachment lien acquired in said suits destroyed any and all liens, and therefore destroyed any rightful possession which the defendant below may have acquired upon said wood by reason of said attachments, and that during the interval between the rendition of said judgments and the subsequent seizure of the property

under execution, plaintiff's title and possession to said wood became perfected (if the same was not complete), by reason of the public notices on each of the four (4) corners of said wood posted by plaintiff May 18th as aforesaid, claiming the ownership of said property.

Judgment was entered in the Ringseth case at two o'clock P. M., May 24th, as aforesaid, and on said day a plain execution was issued (Tr. pp. 77-78), but that such execution was not placed in the hands of the Marshal until May 25th (Tr. p. 78), on which date an alleged seizure of one hundred twenty-three (123) cords of wood was made under said execution by said Marshal, and a sale under said seizure, June 6th, 1912, for One Thousand Seventy-Six Dollars (\$1,076.00) to the said Ringseth, plaintiff in one of said Justice cases, and alleged custodian of said property under said Marshal, the plaintiff in error herein. An interval, therefore, exists between the entry of judgment and the seizure under execution.

Contrary to the common law, no lien attaches in Alaska against the personal property of a defendant under execution until actual seizure. Section 1106, Subdivision 5, Compiled Laws of Alaska, provides:

“Until a levy, property shall not be affected by the execution. When property has been sold or debts received by the Marshal on execution, he shall pay the proceeds thereof, or sufficient to satisfy the judgment, to the Clerk by the day on which the writ is returnable.”

Execution was not issued in the McLean case

until June 12th (Tr. pp. 79-80), under which a levy and sale was made of forty (40) cords, being the balance of said wood, for Two Hundred Seventy-Five Dollars (\$275.00), June 25th, 1912 (Tr. pp. 88-89), at which sale the said Ringseth, who at all times had full notice of plaintiff's claims in the premises, became the purchaser. Plaintiff, together with an interpreter, was present at said sale of June 6th (Ringseth, the purchaser, being present), and again notified plaintiff in error of his claim of ownership to said property (Tr. pp. 27, 28, 43, 44, 90 and 99).

The trial of said cause began April 25th, 1913, before the Court and Jury and continued with the ordinary trial proceedings, which on the 29th of April resulted in a verdict by the Jury in favor of plaintiff and against the defendant for the sum of Thirteen Hundred Twenty-five Dollars (\$1,325.00) (Tr. p. 128). That after defendant's motion for a new trial was overruled by the Court, judgment was, on May 24th, 1913, entered against defendant in favor of plaintiff in said sum of Thirteen Hundred Twenty-Five Dollars (\$1,325.00) and costs of suit.

Plaintiff in error has in his brief herein set forth the positions relied upon (Brief of Plaintiff in Error, pp. 7-8). The contentions of defendant in error being partially set forth in said Brief of Plaintiff in Error on page 6 and the first three lines of page 7 of said Brief. We desire to add that defendant in error further contends that, even if said bill of sale from Sam Vlik & Company to defendant in error should be treated as a



mortgage, that the same would be a legal mortgage, property in possession of the mortgagee, thereby eliminating the necessity of chattel mortgage formalities contended for by plaintiff in error, for the reason, not only that the possession of defendant in error was sufficient as against plaintiff in error in any event, but that his possession was as complete as the nature of the property and the conditions would permit. That a mortgagee's interest in the property with possession or with a right of possession is sufficient to sustain an action for conversion.

Defendant in error further contends that, by reason of the invalidity of the Justice of the Peace judgments, and by reason of the loss of any attachment liens which may have been acquired, and by reason of the knowledge of the defendant in error and his deputies and alleged custodians (plaintiffs in said Justice cases), as well as by reason of the knowledge of the purchaser at said sales, who is the real party in interest; that the plaintiff in error herein is not, and never was, in a position to complain of any lack of possession of said wood upon the part of defendant in error; and is not in a position to complain of any presumption of fraud or secret trust or intended mortgage, because his entire defense to said action failed upon the trial of said cause.

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### **Argument.**

#### **I.**

Plaintiff in error, in his brief, on page 24, paragraph I, contends that the bill of sale of the property in ques-

tion from Sam Vlik & Co. to plaintiff is void, and declares in subdivision "a," in substance, that said bill of sale was executed by Sam Vlik without authority and without the knowledge or consent of the other partners.

This statement is unwarranted by the evidence. This bill of sale was executed by Sam Vlik & Co. (Plaintiff's Exhibit "A," Tr. pp. 22-23). The partnership consisted of three members only, "There was Sam Vlik and myself (Dan Vlik) and Mike Onak, three of us in this firm" (Tr. p. 44). As shown by the bill of sale the firm's name was signed by Sam Vlik, "Sam Vlik was the manager of the partnership and run the business and had the authority to give this bill of sale" (Testimony of Dan Vlik, Tr. pp. 44-45). Mike Onak, partner, swore: "That the bill of sale was given to pay for wood and horse feed in payment of the debt that Sam Vlik & Co. owed to the plaintiff" (Tr. p. 37). \* \* \* "Sam Vlik told me (Mike Onak) on the night before, on the 17th, he was going to town to give Pavlovich a bill of sale of the wood" (Tr. p. 38). We submit that this evidence clearly shows authority to execute and deliver the bill of sale in question. Furthermore we submit that no one except the partnership or a member of Sam Vlik & Co. could object to any want of authority under the circumstances.

In subdivision "b" of said paragraph I, page 25 of said Brief of Plaintiff in Error, it is contended that a secret trust was in said bill of sale created or reserved in favor of the transferer.

The only evidence which might be argued in favor of plaintiff in error on this point is the testimony of

plaintiff below on his cross-examination as to the reason why the bill of sale recited the consideration of Two Thousand Dollars (\$2,000.00), when in fact the indebtedness sought to be liquidated was but Seventeen Hundred Twenty Dollars (\$1,720.00). It appears that the exact amount of the indebtedness was not known or calculated at the time of making the bill of sale, and it further appears from said testimony that the object of making the bill of sale was to pay the debt. Plaintiff below does admit that if the wood (the exact amount and value of which was then unknown) would sell for more than the debt in question, that Pavlovich did not consider that the excess above the debt would belong to him (Tr. pp. 30-34). We contend that these facts do not change the character of the bill of sale to a mortgage; neither does it create a secret trust, and cannot be regarded as a fraudulent instrument. It is undisputed that the debt due plaintiff was Seventeen Hundred Twenty Dollars (\$1,720.00); that the number of cords of wood covered by said bill of sale and sold by the Marshal was one hundred sixty-three cords instead of two hundred fifteen (215), as recited in said bill of sale; also that the value of said wood was not in excess of the debt, for the market price was less than said debt, to-wit: Thirteen Hundred Fifty-One Dollars and Twenty-Five Cents (\$1,351.25), the aggregate purchase price realized at the Marshal's sales (Tr. p. 89, Defendant's Exhibit 13, Defendant's Exhibit 12, Tr. p. 87). The fact that Pavlovich intended not to take any more money from Vlik & Co. than the amount of his debt in the event the



wood should sell for a greater sum, amounted to a conditional sale, conditioned only upon a contingency which never arose, and could not arise. Therefore it should be treated as an absolute sale.

Plaintiff in Error's contention in subdivision "c" of paragraph I, that plaintiff knew that he was securing a preference and that Vlik & Co. were insolvent, is not based upon the evidence in this record. The only evidence that would tend to show Vlik & Co. insolvent is the testimony of plaintiff to the effect that Sam Vlik came to him on the night before the bill of sale was given and stated he could not pay him any money, but would give him this bill of sale to the wood in question (Tr. pp. 31, 32, 33). This neither proves the insolvency of Vlik & Co. or that plaintiff knew he was securing a preference. However, it is immaterial, even if plaintiff was knowingly securing or attempting to secure a preference. The only way of defeating such attempt would be by bankruptcy proceedings. Plaintiffs in the two Justice cases were attempting, through the United States Marshal, the defendant herein, by their attachments, to secure a preference (if Vlik & Co. was insolvent), and therefor cannot complain herein.

The declarations made under Subdivision "d" of said Paragraph I, page 25, by plaintiff in error, are unwarranted, as there is no testimony that this wood was "practically the only asset of Sam Vlik & Co."

What became of the mine or lease thereon or the mining machinery, or the cleanup of gold about that time, inquired about by counsel for defendant below, does not

appear (Tr. p. 33).

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## II.

Under paragraph II in the brief of plaintiff in error, pages 26-27-28, it is contended that the Marshal made a valid levy under the writ of attachment. The levy was accompanied by the Marshal's possession, and which possession prevented plaintiff below from acquiring any rights under his bill of sale.

To support this contention, subdivision 3 of Section 972 of the Compiled Laws of Alaska is quoted, which requires that a copy of the writ "and a notice specifying the property attached *be left* with the person in possession" (Italics ours.) This was not done, or claimed to have been done. The officer levying the attachment, Mr. Brown, testified that he served a copy of the writ of attachment and the summons (on Dan Vlik) on the mining claim of Sam Vlik & Co. Then he states: "I posted a notice on the wood pile on a post that was standing close to the wood" (Tr. pp. 58-59 and Defendant's Exhibit 2). This same method was followed by said Deputy Marshal in the other Justice case of McLean vs. Sam Vlik & Co. (Tr. pp. 64-65).

In said brief, on said page 26, plaintiff in error admits that it is undisputed that the Marshal served the notice of attachment upon and delivered copies thereof to Dan Vlik, a member of said firm, who was on the ground and in possession of the wood. We therefore contend that the statute quoted by plaintiff in error was not complied with, and therefore, no attachment lien was

created. However, if defendant below did acquire a lien by virtue of said alleged attachments, by taking the same into custody and leaving the same in the custody of defendant's agent, to-wit, Ringseth, and Ringseth delegated such custody to McLean, all upon the theory that the wood was so ponderous that it was impracticable to move the same; we then submit (1) That the uncertainty of such appointments, coupled with the want of action upon the part of said custodians, renders the possession of the Marshal insufficient. The Marshal states that he is uncertain whether he or the Justice Court appointed Ringseth custodian (Tr. pp. 68-69). Ringseth and McLean testified that McLean, in a general way, looked after the possession of this property (Tr. pp. 94, 97). It will not be contended that the Justice had any authority to appoint a custodian for the Marshal, and the testimony of the two custodians discloses that their dominion over the property was in no wise notorious, and was wholly insufficient to give notice to the plaintiff below or any other person. If, however, it be conceded that the property was properly attached and the possession of the custodian sufficient, then on the 18th of May, 1912, when plaintiff secured from Sam Vlik & Co. the bill of sale, he took the property subject to the attachment and gave notice of his claim to the right of possession to all persons concerned by posting four (4) notices in conspicuous places upon the property, and thereafter measured the same (Tr. pp 24, 25, 42, 43). This certainly was the taking of possession as fully as was practicable if the property was subject to a change



of possession. If it was not so subject to a change of possession, it was an open and notorious claim of possession upon the part of plaintiff below.

Even if liens were secured by proper levy, they were lost by failure of the Justice to foreclose them.

Moore, Shafer Shoe Mfg. Co. vs. Billings (Or.),  
80 Pac., 422.

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### III.

In paragraph III, pages 29, 30, 31, 32 of the brief of plaintiff in error, great emphasis is placed upon the necessity of an actual, open and notorious change of possession from Sam Vlik & Co. to plaintiff below in order to render the bill of sale in question effective. Counsel supports such declaration by a large number of authorities from the States of California, Colorado and Montana.

In each of these three States the want of such change of possession is taken to be CONCLUSIVE proof of a fraudulent conveyance and therefore void. This is not the law under the statutes of Alaska. In California Civ. Code, Section 3440, it is provided, "that a sale of personal property shall be CONCLUSIVELY PRESUMED to be fraudulent, as against the seller's creditors, where there is no immediate delivery and actual and continued change of possession."

Guthrie vs. Carney, 124 Pac., 1045.

In Colorado, under Gen. St. Colo., c. 43, Section 14, "providing that every sale of goods, unless accompanied by immediate delivery and followed by actual and con-

tinued change of possession, shall be CONCLUSIVELY PRESUMED fraudulent as against the vendor's creditors."

Sweeney vs. Coe et al., 21 Pac., 705.

1 Mills' Ann. St. (Colo.), Sec. 2027.

In Montana, the code on this subject provides that "every transfer of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession is CONCLUSIVELY PRESUMED fraudulent and void against creditors, etc."

Revised Codes (Montana), Sec. 6128.

Taylor vs. Malta Mercantile Co., 132 Pac., 549.

But, under the code of Alaska fully set forth on page 21 of said brief of plaintiff in error, it is declared that a lack of such change and continued possession "shall be *presumed prima facie* to be a fraud against the creditors of the vendor."

Sec. 1875, Compiled Laws of Alaska.

We, therefore, contend that, even if there was a want of such change of possession as the statute contemplates, that in Alaska the presumption of fraud is only *prima facie*, and that in the case at bar, this presumption was overcome by the evidence which was submitted to the Jury, and the Jury rightfully upheld the validity of the said bill of sale.

The declaration of plaintiff in error on page 30 of his said brief, to the effect that there is no evidence that the Marshal had notice of the claim of said wood by Pavlovich, is unwarranted.

Ringseth and McLean, the two plaintiffs in said Justice cases, both claiming to be agents of the United States

Marshal as custodians of the property, knew long before the sale or levy under execution, and both testified to the knowledge of the notices posted upon the wood by Pavlovich (Tr. pp. 92-99). The Marshal also knew, as he secured an indemnity bond (Tr. p. 44).

Just before the sale of said wood took place June 6th, Deputy Marshal Carlson was fully notified of the claim of Pavlovich to said wood, whereupon the real party in interest in this case became the purchaser (Tr. pp. 27, 28, 43, 44, 90, 99). Besides all this actual notice to the defendant below, there were the four (4) notices posted in conspicuous places upon the four (4) corners of said wood piles, setting forth the claim to said wood and the right of possession of plaintiff below. We, therefore, contend that, inasmuch as all persons concerned had notice of Pavlovich's right of possession, that his continued claim to the right of possession, as set forth in these notices, certainly attached to the wood immediately upon the loss of the attachment lien.

Moore, Shafer Shoe Mfg. Co. vs. Billings, *supra*.

Shinn on Attachment, Last Par., p. 393.

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#### IV.

Plaintiff in error's position set forth in paragraph IV, page 32, of his brief, we submit, is untenable. There is no evidence in the case proving or tending to prove that Pavlovich knew that the bill of sale was made for the purpose of hindering and defrauding other creditors. The fact is, that it was not made for such purpose, but for the purpose of settling the debt due from Vlik & Co. to



plaintiff below. It is true that the bill of sale was given for a past consideration. It is also true that the two plaintiffs in the Justice cases were seeking a preference by attaching on over due debts. Plaintiff in error cannot complain in this suit under these circumstances. The bankruptcy law was not invoked. And the statement of plaintiff in error, on pages 32-33 of his brief, that Pavlovich knew that this transfer coveted "practically the only available asset of the firm," is a bare statement of counsel not supported by the evidence in this case. These matters were duly submitted and passed upon by the Jury in favor of plaintiff below.

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## V.

Counsel's declaration contained in paragraph V, pages 33-34 of said brief of plaintiff in error, to the effect that the Court erred in not permitting defendant below to change the judgment roll of the Justice Court by parol testimony, is not supported by any authority, and we submit, the Court properly disallowed such testimony.

Gaunt vs. Perkins, 9 Or., 355.

Hislop vs. Moldenhauer, 24 Or., 106.

The statute of Alaska relied upon is as follows:

Section 1844, Compiled Laws of Alaska: "A party is entitled to one hour in which to make his appearance after the time specified in the summons, and not otherwise \* \* \*"

It is conceded in the statement of plaintiff in error, page 6 of his brief, and it likewise appears in evidence, that the record of the Justice Court shows the entry of

judgments, in the two cases, to have been made at the hour required by the summons for the defendant's appearance, without waiting an hour thereafter. It necessarily follows that the Justice's record could not be contradicted.

Hislop vs. Moldenhauer, *supra*.

State vs. Connelly, 90 Pac., 902.

We contend that the premature entry of these judgments renders each of them void, and that from the time the same appeared in this case, defendant had no further standing in Court.

"Docket must show jurisdiction, otherwise judgment is void."

State ex. rel. Kenyon, 53 Pac. (Mont.), 536.

Gaunt vs. Perkins, 8 Or., 355.

That the alleged liens created in these Justice Court cases by attachment were lost in entering the judgments, by the omission of an order foreclosing such liens, is conclusively settled by the Alaska statute, which is as follows:

Sec. 979, Compiled Laws of Alaska: "If judgment be recovered by the plaintiff and it shall appear that the property has been attached in the action and has not been sold as perishable property or discharged from the attachment as provided by law, the Court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the Marshal shall apply the property attached by him, or the proceeds thereon, upon the execution, and if there be any such property or pro-

ceeds remaining after satisfying such execution, he shall, upon demand, deliver the same to the defendant.”

Moore & Shafer Shoe Mfg. Co. vs. Billings, 80 Pac. Rep., 422.

These liens are conceded to be lost in the brief of plaintiff in error (pp. 3, 33, 37).

In this action, defendant below, as a defense, relies upon the regularity of the proceedings in the Justice Court, and in his answer pleads the same (Tr. pp. 4, 5, 6, 7, 8). In plaintiff's reply, plaintiff controverts the same and challenges the validity of such proceedings. Section 909, Compiled Laws of Alaska, throws the burden of proof upon the defendant under these circumstances, and is as follows:

“In pleading a judgment or other determination of a court or officer of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.”

Justice of the Peace docket must show facts to confer jurisdiction. Section 1777, Subdivisions 4 and 9, Compiled Laws of Alaska, provides:

“Section 1777. The docket of a Justice of the Peace is a book in which he must enter:

“Subdivision 4: The time when the parties, or either of them, appear, or their failure to do so.



“Subdivision 9: The judgment of the Court and when given.”

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## VI.

The position of plaintiff in error set forth in paragraph VI, pages 34-35 of his said brief, has, we believe, been covered elsewhere in this brief by defendant in error. To have sustained a motion for a nonsuit would have encroached upon the province of the Jury by the Court. We contend that the case was properly submitted to a Jury for determination.

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## VII.

We submit that the instructions proposed by defendant below and refused or modified by the Court, were properly ruled upon under the law of this case. Many of the proposed instructions of defendant below were, in substance, given by the Court.

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## VIII.

Plaintiff in error complains of a number of instructions given by the Court, as set forth in paragraph VIII, pages 35-36-37 of his said brief; but, we submit, that upon a consideration of all of the instructions given by the Court, under the facts of this case, it clearly appears that the law, applicable to the case at bar, was properly defined to the Jury.

The complaint of plaintiff in error made on pages 37-38 of his brief, that defendant in error herein is attempting to mulct the United States Marshal in damages and

compelling said Marshal to go to the expense of defending an official act, performed in due course of business, etc., would be passed unnoticed by us were it not that the record herein discloses the fact to be that the defendant Marshal is not the real party in interest, and has not been to any expense in defending his official acts, but has, in advance, obtained security for any damages in the premises, and that the real party in interest is the purchaser of said wood, and who had, at all times, actual notice of plaintiff's claim (Tr. pp. 43-44).

The attempt of plaintiff in error to discredit Pavlovich and abuse Sam Vlik, and draw upon his imagination, and not the record, as set forth on pages 38-39 of said brief, are wholly unwarranted. On page 1 of said brief, counsel, without one syllable of evidence in the record, declares that all the members of Sam Vlik & Co. are Austrians, and on page 38 states that Sam Vlik, after making a cleanup of gold on May 17th, and executing this bill of sale May 18th, "immediately disappeared from the scene and returned to Russia." Counsel for plaintiff in error asks this Court to presume that the creditors did not receive this gold dust, and blames defendant in error for this situation. There is no evidence that Sam Vlik went to Russia, no evidence that he "immediately disappeared from the scene"; and the only evidence in regard to Sam Vlik's whereabouts appears in the testimony of Dan Vlik, who stated in the trial, about one year after this bill of sale was executed, that at said time Sam Vlik was in the "old country" (Tr. p. 44). On page 39, said counsel asks this Court not only to accept

these matters as truths, but to accept them as material and as a reason why the trial Court erred in not granting defendant's motion for a directed verdict in favor of defendant below.

We submit that the instructions of the Court covered the facts, and are according to the law of this case. That the rulings of the Court are according to law, so far as they relate to the case of the plaintiff in error.

We contend, however, that each of the two judgments prematurely entered in the Justice Court are void for all purposes. It, therefore, follows that the execution, seizure and sale under each of said judgments were void, and that plaintiff's contention of said invalidity at the trial was not a collateral attack upon the same, and that the Court below should have ruled that defendant's defense wholly failed at said trial.

We, therefore, submit that the judgment of the lower Court should be, in all respects, affirmed.

Respectfully submitted,

H. A. DAY and

MORTON E. STEVENS,

*Attorneys for Defendant in Error.*

Dated Fairbanks, Alaska,

October 15th, 1914.



No. 2423

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United States

# Circuit Court of Appeals

For the Ninth Circuit.

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NORTHWESTERN LUMBER COMPANY, a Corporation,

Appellant,

vs.

GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY, a Corporation, OREGON AND WASHINGTON RAILROAD COMPANY, a Corporation, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation, and CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation,

Appellees.

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## Transcript of Record.

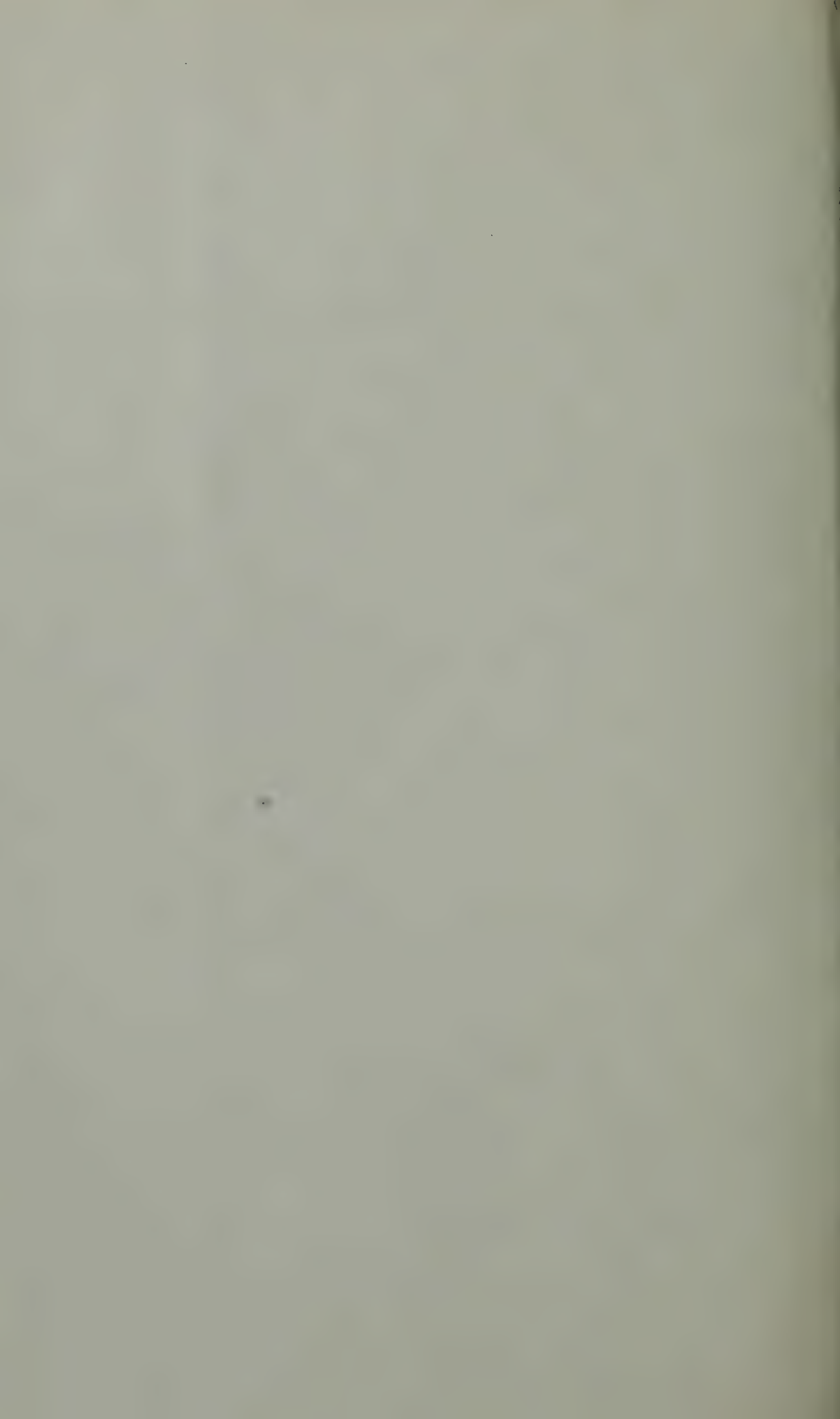
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Upon Appeal from the United States District Court  
for the Western District of Washington,  
Southern Division.

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**FILED**

**JUL 1 - 1914**



No. 2423

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United States

**Circuit Court of Appeals**

**For the Ninth Circuit.**

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NORTHWESTERN LUMBER COMPANY, a Corporation,

Appellant,

vs.

GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY, a Corporation, OREGON AND WASHINGTON RAILROAD COMPANY, a Corporation, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation, and CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation,

Appellees.

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**Transcript of Record.**

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Upon Appeal from the United States District Court  
for the Western District of Washington,  
Southern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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### **Names and Addresses of Solicitors.**

BENJAMIN S. GROSSCUP, Esquire, #411 Bank of California Building, Tacoma, Washington, and

W. CARR MORROW, Esquire, #411 Bank of California Building, Tacoma, Washington,

Solicitors for Complainant and Appellant.

W. H. BOGLE, Esquire, #609-16 Central Building, Seattle, Washington;

CARROLL B. GRAVES, Esquire, #609-16 Central Building, Seattle, Washington;

F. T. MERRITT, Esquire, #609-16 Central Building, Seattle, Washington; and

LAWRENCE BOGLE, Esquire, #609-16 Central Building, Seattle, Washington,

Solicitors for Respondents and Appellees.

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### **Bill in Equity for Specific Performance.**

To the Judges of the Circuit Court of the United States for the Western District of Washington:

The Northwestern Lumber Company, a corporation now, and at all times hereinafter mentioned, organized and existing under the laws of the State of California and a citizen of said State of California, brings this its bill, against Grays Harbor and Puget Sound Railway Company, now and at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Washington and a citizen of said State, Oregon and Washington Railroad Company, a corporation now, and at all times hereinafter mentioned, organized and existing under



the laws of the State of Oregon and a citizen of said State, Oregon-Washington Railroad and Navigation Company, now and at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Oregon and a citizen of said State, and the Chicago, Milwaukee and Puget Sound Railway Company, now and at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Washington, for its bill of complaint says as follows:

I.

Your orator is a corporation, and at all times since prior to the year 1908 has been a corporation duly organized and existing under and by virtue of the laws of the State of California and a citizen of said State, and at all said times has been in active business in the State of Washington as a foreign corporation, having at all times complied with the laws of the State of Washington, relating to foreign corporations, and having paid its annual license [1\*] fee as provided by law, at all times required for said payment, and your orator is a citizen of the State of California.

II.

The defendant Grays Harbor and Puget Sound Railway Company was incorporated under the laws of the State of Washington, prior to the month of October, 1908, and has at all times since existed as a corporation under the laws of said State, and is a citizen of said State of Washington; said defendant for brevity will hereafter in this bill be designated

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\*Page number appearing at foot of page of original certified Record.

Grays Harbor Company. Oregon and Washington Railroad Company was, prior to the month of October, 1908, duly incorporated under the laws of the State of Oregon, and has ever since existed as a corporation under the laws of said State, and is a citizen of said State of Oregon; said corporation has, as your orator believes, ever since the date of its incorporation, transacted business in said State of Washington, under and by virtue of the laws of said State of Washington relating to foreign corporations; said corporations will hereafter in this bill, for brevity, be called Oregon Company. Defendant Oregon-Washington Railroad and Navigation Company was, on or about the first of December, 1910, incorporated under the laws of the State of Oregon, and has ever since been doing business under the laws of the said State of Oregon, and has engaged in business in the State of Washington, by virtue of the incorporation laws of said State of Washington, and is a citizen of the State of Oregon. Said corporation will hereafter in this bill, for brevity, be called Navigation Company. The defendant Chicago, Milwaukee and Puget Sound Railway Company was incorporated under the laws of the State of Washington, prior to June 27th, 1910, and [2] has ever since existed under the laws of the State of Washington, and is a citizen of the State of Washington. Said corporation will, for brevity, hereafter in this bill be called Milwaukee Company.

### III.

In the year 1908, and prior to the month of October, in said year, the Grays Harbor Company, by



virtue of its charter of incorporation and the resolution of its trustees, began the construction of the line of railway extending from the city of Centralia, in Lewis County, Washington, to and into the city of Hoquiam, in Chehalis County, Washington, together with facilities for handling freight and passengers, with such buildings, structures and appliances, as are usual and ordinarily incidental thereto. For the purpose of securing the necessary land, rights of way and other property, together with other duties, they employed one H. F. Baldwin, under the title of Chief Engineer, and authorized said H. F. Baldwin to contract for property necessary and useful for the carrying out of said purposes; said H. F. Baldwin, in pursuance of his duties, and acting for the said Grays Harbor Company, opened negotiations with the complainant, Northwestern Lumber Company, for the purchase of certain lands, rights of way and facilities in the city of Hoquiam, and in the course of said negotiations submitted to the complainant a map of part of said city, on which map was drawn and indicated certain properties under consideration of the parties in connection with said negotiations. Thereafter, as a result of said negotiations and in pursuance thereof, and at the request of the said Grays Harbor Company, made through said Baldwin, its agent, the complainant, [3] Northwestern Lumber Company, submitted to said Baldwin, acting as agent aforesaid, in writing, a proposition in words and figures as follows:



“September 25, 1908.

Mr. H. F. Baldwin,  
Burke Building,  
Seattle, Wash.

Dear Sir:—

We have found it necessary to make some changes in the schedules left with us yesterday, such as, for instance, in Block 59 your requirements showed Lots 13 & 14. On these we have quoted right of way only, as we should object very seriously to anything in the nature of a round-house or watering-place in such close proximity to our buildings. If this is required for some purpose other than that we will make you a price on it. At present it is occupied by our stable, and right of way could be granted without entirely destroying it for that purpose.

‘Railroad Avenue Line,’ which contemplates station on Lots 1 & 2, Tract 4, Plate 5, Hoquiam Tide & Shore Lands, we make you the following specifications in price;

Through our shingle-mill boom to Railroad Avenue, as shown on your map, not to cut our dry kiln or shed, on the South side of Railroad Avenue, you to build with a 40-foot span at log boom;

A 25-foot right of way through Block 70 on West side of Northern Pacific and adjoining Northern Pacific right of way;

60x150 feet on Levee Street, in Block 62, and a 25-foot right of way to replace right of way in Levee Street, we to remove the buildings;

A 25-foot right of way to replace area used in

Levee [4] Street, Block 61, we to remove buildings;

A 25-foot right of way for eighty-eight feet in Block 51, to replace right of way used in Levee Street, we to remove buildings;

A 25-foot right of way to replace area used in Levee Street, Block 50, we to remove buildings;

A 25-foot right of way, Block 38, Lots 15 & 16;

A 25-foot right of way next to the Northern Pacific, Block 69, we to remove buildings.

A 25-foot right of way along Twelfth Street vacated, now Lot 3, Tract 15, Plate 9, Hoquiam Tide & Shore Lands, to K Street, on the North side of the Northern Pacific track, all for the sum of \$66,000.00, Sixty-six Thousand Dollars.

'River Avenue Line,' which contemplates depot on the East side of the river.

Right of way through Blocks 38, 50, 51, 61, 62, 70, 69, and Lots 3, Tract 15, Plate 9, to K Street, as mentioned in Railroad Avenue Line proposition herewith, all for the sum of \$62,000.00 Sixty-two Thousand Dollars.

'Simpson Avenue Line,' with depot grounds in Block 50.

Across Northwestern Lumber Company's log pocket on the extension of Simpson Avenue, which is across Lot 1 of Tract 15, Plate 9, Hoquiam Tide & Shore Lands; thence across or along Levee Street, adjacent to Blocks 70, 62, 61, *eight*-eight feet in Block 51 and two hundred and fifty feet, eleven inches, in Block 50, together with the return right of way through Blocks 62, 70 & 69, joining Northern Pacific



right of way through those blocks and through Lot 3, Tract 15, Plate 9, to Railroad Avenue along Twelfth Street vacated and adjoining Northern Pacific track, to K Street. This [5] right of way to be adequate for double trackage except on its return or switch track through Blocks 70, 69 and Twelfth Street. Also to include for depot grounds the East 182 feet of Block 50, all for the sum of \$102,000.00, One Hundred Two Thousand Dollars.

‘Emerson’s proposition.’ The same as Simpson Avenue Line, omitting depot grounds in Block 50 and adding the East half of Blocks 62 & 61 and eighty-eight feet on Levee Street by 100 feet in Block 51, you to join with the Northwestern Lumber Company dedicating 50-foot street along the center line of Blocks 61 & 62, for the sum of One Hundred Thirty-four Thousand Dollars (\$134,000.00).

Yours truly,

NORTHWESTERN LUMBER COMPANY,

GEORGE H. EMERSON,

Vice-President.”

#### IV.

Thereafter the said defendant, the Grays Harbor Company, having considered the said several alternative propositions embraced in said letter, accepted the proposition therein contained and understood by the parties, and each of them, respectively, and styled by them the “Emerson Proposition,” which acceptance was in writing and in words and figures following, to wit:



“June 9th, 1909.

Northwestern Lumber Company,  
Hoquiam, Wash.

Gentlemen:

We beg to advise you that we accept what is called [6] the ‘Emerson’ proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for One Hundred and *Thirty-four* (\$134,000) *Dollars*.

We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers.

However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.

You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid sum. All buildings to be removed by you within six months from date of deed.

THE GRAYS HARBOR & PUGET SOUND  
RY. CO.

By H. F. BALDWIN.

We accept the foregoing proposition.

THE NORTHWESTERN LUMBER COM-  
PANY,

By C. H. JONES,  
Prest.”

Said Baldwin, acting for the said Grays Harbor Company, as a part of the said acceptance and im-

mediately after the delivery thereof, substituted for the map which was before the parties during their negotiations hereinbefore recited a clean map showing in detail the land, rights of ways and the properties covered by the said agreement, and showing the land intended to be conveyed thereunder, a copy of which map is hereto attached to this bill and made a part hereof, [7] marked Exhibit "A."

V.

On June 10, 1909, in pursuance of the agreement entered into between the complainant and the defendant, the Grays Harbor Company, complainant ordered abstracts of title covering the lands described in said agreement, which abstracts, at the request of the said Grays Harbor Company, were delivered on June 12th, 1909, to J. B. Bridges, attorney for said company at Aberdeen, Washington. Said abstracts disclosed the power of the complainant, Northwestern Lumber Company, to convey a clear and unencumbered title to said property and each and every parcel thereof. It was understood at said time that the record title to one or more parcels included in said contract stood in the name of other parties, but that the complainant had power to contract for the sale of such parcels, and was able to deliver clear title thereto, and conveyance from said parties holding the record title have since been made, so that at all times since said agreement complainant, Northwestern Lumber Company, has been able and willing to make full, clear and unencumbered title to each and all of said land and



each and every parcel thereof.

## VI.

In pursuance of said agreement, on the second day of July, 1909, J. B. Bridges, acting as an attorney for defendant, the Grays Harbor Company, submitted to the complainant, a draft of formal agreement, embracing in extensive detail, a description of the lands to be conveyed by the complainant, and purchased by defendant, the Grays Harbor Company, whereupon said draft of agreement was [8] considered by the parties. H. F. Baldwin, prior to July 2, 1909, had deceased, and one J. R. Holman had become the successor of said H. F. Baldwin, and said J. R. Holman, after conference relating to the terms of said formal agreement, as Chief Engineer and Right of Way Agent of the said Grays Harbor Company, agreed with the complainant, upon the terms of said formal contract made in pursuance of the real contract hereinbefore stated, whereupon said formal contract was executed by the complainant, and is in words and figures following:

“THIS AGREEMENT, made and entered into this 7th day of July, 1909, by and between Northwestern Lumber Company, a corporation, as the party of the first part, and Grays Harbor and Puget Sound Railway Company, a corporation, as the party of the second part,

### WITNESSETH:

1st. The said party of the first part, for the consideration of \$134,000.00, to be paid down by second party, Twenty Thousand Dollars of which is paid down by second party, the receipt whereof is



hereby acknowledged, and the covenants and agreements hereinafter mentioned, does hereby agree to sell and convey unto the said party of the second part the following-described lands in the corrected plat of Hoquiam, Washington, to wit:

The Northeasterly half of Block 62, subject to the right of way heretofore given to the Northern Pacific Railway Company by the said party of the first part by deed dated Dec. 21, 1897, and recorded in Vol. 53 of the Record of Deeds of Chehalis County, Washington, at page 580.

All of that portion of Block 61 described as follows, [9] to wit: Commencing at a point on the Southerly line of said Block 61, which point is 159.8 feet Easterly of the Southwest corner of said Block, thence Easterly along the Southerly boundary of the said block 159.8 feet to the Southeasterly corner of said block, thence Northwesterly along the Easterly boundary of said block 310.64 feet, more or less, to the Northeasterly corner of said block, thence Westerly along the Northerly line of said block 158.7 feet, thence Southeasterly to the place of beginning.

A strip of land in Block 51 described as follows:

Commencing at the Southeasterly corner of said block, running thence Southwesterly along the Southerly boundary line of said block 100 feet, thence Northwesterly at right angles to the Northerly line of Ninth Street, 87.76 feet, thence Northeasterly and parallel with the said Northerly line of Ninth Street to the intersection of said line with the Easterly line of said block, thence Southerly to

the place of beginning.

A strip of land twenty-five feet in width in Block 50, and particularly described as follows:

Commencing at the Northeast corner of said block; thence Southeasterly along easterly boundary of said block, 250.11 feet to the alley through said block; thence Southwesterly along Northerly line of said alley a distance of twenty-five (25) feet; thence Northwesterly and parallel to the Easterly boundary of said block 250.11 feet to the Northerly boundary line of said block; thence along said boundary line of said block a distance of twenty-five (25) feet to place of beginning.

Also a right of way for railroad purposes only, twenty-five [10] feet in width next to the Northern Pacific Railway Company's right of way, in Lot 16, of Block 38, being all of the rights which the said first party reserved in its deed to the Hoquiam Lumber & Shingle Company of said Lot 16, said deed being dated June 3, 1908, and recorded in Vol. 98 of deeds of Chehalis County, Washington, Page 32.

Also a strip of land twenty-five feet in width in Block 70, the said strip of land being parallel and adjacent to, and on the Westerly side of the right of way of the Northern Pacific Railway Company through the said Block 70, as the same was deeded to it by the said party of the first part by deed dated December 21, 1897, and recorded in Vol. 53 of deeds of the said County at page 580.

Also the following strip of land in said Block 70, to wit:



Commencing at the Northeasterly corner of said Block 70, thence Southerly along the Easterly line of said Block 100 feet; thence Northwesterly on a curve having a radius of 598 feet to its intersection with the North line of said Block 70; thence Easterly along the Northerly line of said Block 70, 12.5 feet more or less to the place of beginning.

Also a strip of land twenty-five feet in width over and across parts of lots 12, 13, and 14, in Block 69, said twenty-five ft. strip being immediately adjacent to and parallel with and on the Northwesterly side of the Northern Pacific Railway Company's right of way as deeded to the said last-named company by said deed recorded in Vol. 53 of deeds at page 580.

Also a strip of land twenty-five feet in width over and across that portion of 12th Street vacated, said strip being parallel with and adjacent to and on the Northerly side of right of way of the Northern Pacific Railway Company, according [11] to its deed of date, volume and page last aforesaid.

Also a tract of land twenty-five feet in width through that portion of Lot 1, Tract 3, Hoquiam Tide and Shore Lands between the Southerly line of the Northern Pacific right of way and the Easterly line of K Street, being  $12\frac{1}{2}$  feet on each side of the center line of the railroad of the said second party, as the same may hereafter be located across said Lot 1 and substantially as shown upon the map hereunto attached and made a part hereof.

Also a strip of land fifty feet in width through Lot 1, Tract 15, Hoquiam Tide and Shore Lands,



and over and across that portion of Levee Street which is Northeasterly of Block 70, being twenty-five feet on each side of the center line of the Grays Harbor and Puget Sound Railway Company as the same shall *shall* be hereafter surveyed, located and staked out and said strip of land shall be substantially as shown upon the exhibit hereunto attached and made a part hereof

Also all that portion of Lots 1 and 3, Tract 15, and of the Hoquiam Tide and Shore Lands which may be affected by the swing of any bridge which the said second party may construct and operate across the Hoquiam River at what is known as the Simpson Avenue crossing, the rights to be given for such bridge swing to be easements only.

Also the right and privilege of constructing, maintaining and operating perpetually a line of railroad upon that portion of Levee, so called, lying between Sixth Street on the North, and Eleventh Street on the South, and between the Northeasterly boundary lines of Blocks 38, 50, 51, 61, and 62, and the Northern Pacific R. R. right of way on said Levee Street, including the crossings of 7th Street, 9th Street, 10th Street and 11th Street. [12]

All of said instruments so to be executed by the Northwestern Lumber Company shall be by deeds of warranty, except the twenty-five ft. right of way reserved in said Lot 16, Block 38, and except the easements for the swing of the said bridge across Lot 1, Tract 15, and except said 7th, 9th, 10th & 11th Street crossings, as heretofore mentioned, and except said rights in Levee Street, and said convey-

ances or rights so excepted as above, shall be transferred by assignments, deeds of easement, or quitclaim deeds as the case may be.

3d. Whenever either of the parties hereto demand same, each shall dedicate to the public a twenty-five foot strip of land for street purposes through the center of said Blocks 61 and 62, and of the said first and second parties hereto so dedicating a twenty-five foot strip.

4th. In the event the said second party should petition the Council of the City of Hoquiam for a vacation of those portions of 9th Street and 10th Street and 11th Street which lie Northeasterly of the street to be dedicated as above mentioned, the said first party agrees to assist in procuring such vacations and agrees to and does waive any and all damage to any of its property on account of such vacation. But, however, said second party agrees that as soon as said portion of Ninth Street shall be vacated, it will, by a proper instrument in writing, give to the first party and to the Public at large a perpetual crossing or easement over said strip so vacated for all kinds of travel by foot or team or otherwise (except the right to lay any kinds of tracks thereon), and thereafter said second party, its successors and assigns, shall maintain at its, or their, own expense such easement in suitable condition for such travel [13] and will keep said crossing or easement open, and will not suffer or permit the same to be blocked by any of its acts; but second party will, in such instrument, reserve forever the right to put, maintain and operate railroad



tracks over and across the same, in any number or manner it may see fit, but always upon grade with the streets immediately surrounding such part of street so vacated.

The easement so to be given shall not, however, place said crossing or roadway under the control of the City of Hoquiam, nor shall it make the same, nor shall it become a common street of said city; but, however, the police officers of said city may keep said roadway open for said travel, and keep the same from being blocked.

5th. The deeds hereby called for and the payments herein provided to be made shall be made on or before the first day of August, 1909, provided the title to the lands herein described be found by the second party to be sufficient and be passed by its attorneys.

6th. The said first party shall be entitled to the possession of the lands herein agreed to be conveyed for the period of six months immediately following the date of the execution and delivery of the deeds and instruments herein provided for; such possession to be free of rent, and the said first party is given the right to remove any and all buildings or improvements on any of the said lands provided such removal be done on or before six months of the date of said deed and other instruments, provided said party of the second part may enter upon any of the premises herein proposed to be conveyed, for the purpose of beginning and carrying on the construction of its railroad and bridges, [14] in so far as it can be done without injury to the said party of the first



part, and in the enjoyment of right granted them in the first part of this paragraph.

7th. It is agreed by the said first party and their officers, that they will co-operate with the said second party in procuring such franchises of the City of Hoquiam as it may desire, and in securing such additional rights of way in the City of Hoquiam as the second party may desire.

8th. It is stipulated by the first party that the construction of the approach to the proposed bridge on the extension of Simpson Ave. shall be so arranged as to interfere with the handling of logs in their mill pond the least possible, and with that object in view that an ample span shall be placed West of the West pier of the drawbridge, and that the bridge abutment be placed as nearly as possible, consistent with the economical spacing of the spans of said bridge, and in accordance with the requirements of the U. S. Government, about thirty ft. into the river from the line of the piles of the first party's pond as such piles are now driven. It is also further stipulated by the first party that such bridge may be a joint user bridge with the City of Hoquiam provided the City of Hoquiam contributes its share of cost of construction and maintenance.

IN WITNESS WHEREOF, all of the said parties have caused this instrument to be executed by their proper officers and their seals to be affixed hereto

18      *Northwestern Lumber Company vs.*

on the day and date in this instrument first above written.

NORTHWESTERN LUMBER COMPANY,

By C. H. JONES,  
President.

By A. R. JONES,  
Ass't Secretary.

GRAYS HARBOR AND PUGET SOUND  
RAILWAY COMPANY. [15]

By \_\_\_\_\_,  
President.

By \_\_\_\_\_,  
Secretary.

State of Washington,  
County of Chehalis,—ss.

At the same time and place personally appeared before me C. H. Jones and A. R. Jones, who are to me well known to be respectively the President and Assistant Secretary of the *Northwest Lumber Company*, and they acknowledged the foregoing instrument to be a free and voluntary act and deed of the said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute such instrument, and that the seal affixed is the corporate seal of said company.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and date in this certificate first above written.

WALTER C. GREGG,  
Notary Public for the State of Washington, Residing at Hoquiam.

State of Washington,  
County of Chehalis,—ss.

Be it remembered that on this — day of —, 1909, personally appeared before me, A. J. West, who is to me known to be the President of the Grays Harbor and Puget Sound Railway Company, and acknowledged the foregoing instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument. [16]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and date in this certificate first above written.

\_\_\_\_\_,  
Notary Public for the State of Washington, Residing at Aberdeen.

State of Washington,  
County of King,—ss.

Be it remembered that on this — day of —, 1909, personally appeared before me G. C. Teal, who is to me known to be the Secretary of the Grays Harbor and Puget Sound Railway Company, which executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation, and on oath stated that he was authorized to execute such instrument, and that the seal affixed thereto is the seal of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and date in



this certificate first above written.

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Notary Public for the State of Washington, Residing at Seattle."

## VII.

On the 7th day of July, 1909, the complainant at the request of said J. R. Holman, forwarded said formal agreement duly executed, to the chief office of the company [17] at Seattle, Washington, accompanying said transmission with the letter following:

"July 7, 1909.

Grays Harbor & Puget Sound Railway Company,  
Burke Bldg., Seattle, Wash.

Gentlemen:—

We enclose herewith duplicate copies of the Agreement this day reached at Hoquiam, Wash. by your Company represented by your engineer, Mr. J. R. Holman, and our Company, represented by our President, Mr. C. H. Jones. These copies have been duly executed by the Northwestern Lumber Company and one of them please have executed by your Company and return to us, together with remittance stipulated, twenty thousand dollars (\$20,000).

Yours truly,

NORTHWESTERN LUMBER CO.,

GEORGE H. EMERSON,

Vice-Pres."

## VIII.

On or about September 15th, 1909, the defendant, the Grays Harbor Company, having through its attorney, J. B. Bridges, examined the abstracts of

title to the property to be conveyed by this complainant, and this complainant not having received a duplicate of the said agreement duly executed by the said company requested the said Bridges to deliver to the complainant the said formal agreement, which request the said Bridges, for and in behalf of the said corporation, answered in words and figures following: [18]

“Sept. 15, 1909.

Northwestern Lumber Co.,

Hoquiam, Wash.

Gentlemen:

Per your request of this date I herewith hand you a proposed agreement between yourself as the party of the first part, and Grays Harbor and Puget Sound Railway Company as the party of the second part, the same being with reference to the purchase of certain properties from you. Such agreement being dated July 7, 1909, and having been executed by you, but not by the Railway Company.

I consider that since this agreement has not been executed by the Railway Company yet you are entitled to have it returned to you, but by so returning to you it is not the intention of the Railway Company to waive any rights which it has with reference to the agreement to purchase this property and I anticipate that it is not your intention that the handing of these papers to you should have that effect.

Yours truly,

J. B. BRIDGES,

For G. H. & P. S. Ry. Co.”

## IX.

Between June 9, 1909, and September 15, 1909, the general officers of the complainant and the general officers of the defendant, the Grays Harbor Company, held frequent conferences. The complainant immediately after the making of said agreement on June 9, 1909, began to make preparations for the vacation of said property, which preparations [19] included the construction of a new residence for the Vice-president and Manager of the complainant, George H. Emerson, the site of his former residence being included in the property sold. Complainant also entered construction of a new building for the carrying on of the merchandise branch of its business; tenants were notified of the termination of their leases and were required to vacate the property, and in other respects the complainant in good faith was carrying out the terms of said agreement, at an expense to it of many thousand dollars. At the said conferences the officers of the said Grays Harbor Company were notified of these expenditures and these preparations. Notwithstanding such notice and knowledge of the said Grays Harbor Company of said expenditures in the performances of said agreement, the said Grays Harbor Company indicated no intention or desire to cancel the said contract.

## X.

In pursuance of said contract the complainant has not only expended many thousand dollars, to wit: Upwards of Fifty Thousand Dollars (\$50,000.00), but has in various and sundry ways changed the lo-



cation and nature of its business.

XI.

This complainant has at all times since the ninth day of June, 1909, been, and is now, ready and willing to enter into a formal agreement in strict accordance with the terms of the contract consummated on that date, and on its part has strictly complied with said agreement. The formal contract signed by the officers of the complainant, copy of which is hereinbefore set forth, in form and substance conforming to the request of agents and officers of the [20] defendant, the Grays Harbor Company, having charge of the business for the said company, is herewith tendered. If, in strict language, the said form departs from the substance and intentions of the parties, the complainant is now, and always has been, ready to reform said formal agreement to conform to and express their intention.

XII.

One June 27th, 1910, defendant, Grays Harbor Company, entered into a contract in the form of a deed duly acknowledged with defendant Oregon Company, wherein and whereby the Grays Harbor Company sold and conveyed to the Oregon Company all its property of every kind and character, including contracts, rights of way, franchises, powers and privileges, together with right to enforce the same, and as a part of the consideration of said conveyance the Oregon Company undertook and agreed to assume all the obligations of the Grays Harbor Company, by virtue of which contract and deed the Oregon Company became the owner of the rights of the

Grays Harbor Company, in respect to the property and contract hereinbefore described, and became obligated to discharge the same. On the 23d day of December, 1910, the Oregon Company entered into a contract in the form of a deed duly acknowledged, with the defendant, the Navigation Company, wherein and whereby the Oregon Company assigned and transferred to the Navigation Company all the property, together with other property, acquired by the Oregon Company from the Grays Harbor Company, including the property and contract with the complainant hereinbefore described, and as a part of the consideration for said conveyance the Navigation Company agreed to assume [21] and discharge all the obligations of the Oregon Company pertaining to said contracts.

### XIII.

In said deeds from the Grays Harbor Company to the Oregon Company, and from the Oregon Company to the Navigation Company, reference is made to a contract between the Grays Harbor Company and the defendant, the Milwaukee Company, wherein it appears that the said Milwaukee Company has acquired some interest in the property of the Grays Harbor Company, and that the defendants, Oregon Company and Navigation Company, have taken over said property charged with said interest. The complainant is not informed and has no means of informing itself of the nature of said agreement with the Milwaukee Company, but upon information it states that the Milwaukee Company has some interest in said property and has assumed some obligations and lia-



bilities respecting the same, but as to the extent of said interest and the nature of said obligations, the complainant has not sufficient information to make definite allegation. Complainant has therefore made the Milwaukee Company a party to this proceeding, and asks that it may be required to answer, but not under oath, and set forth the nature and extent of its interest in the controversy, and become subject to whatever judgment and decree may be rendered.

#### XIV.

The complainant has heretofore, to wit, in June, 1911, tendered deeds conveying to the Grays Harbor Company clear title to all the property covered in the contract between that company and complainant hereinbefore stated. [22] This complainant herewith tenders deeds conveying clear and unencumbered title to all the property embraced in said contract, to the defendants or any of them as their interests shall appear.

IN CONSIDERATION WHEREOF and forasmuch as your orator is remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, your orator therefore prays the aid of this Honorable Court:

1. That the said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were herein expressed and they thereunto particularly interrogated, but not under oath, an answer under oath being expressly waived.



2. That the defendant, the Grays Harbor and Puget Sound Railway Company, may be required to execute the formal agreement thereinbefore tendered by the complainant, or in lieu thereof, such other formal agreement as the Court may find in strict conformity with the contract entered into between the parties, and that the defendant, or as the case may be, the defendants, according to their personal interest, may be required to accept deeds conveying the property, particularly described in the formal agreement hereinbefore tendered, and described on the map furnished to the complainant at the time of entering into said contract, to wit: On or about June 9, 1909, which map and which descriptions, by agreement of [23] the parties at the time of making said contract, accurately described the property embraced in the complainant's proposition under date of September 25th, and the Grays Harbor Company's acceptance thereof under date of June 9th.

3. That an account may be taken showing the amount of interest due to the complainant, and that the complainant may be awarded judgment against the defendants and each of them, for the principal sum of One Hundred Thirty-four Thousand Dollars (\$134,000.00), together with interest thereon since the 7th day of July, 1909.

And such other and further relief as your orator may be entitled to in equity and under the practices of your Honorable Court.

May it please your Honors to grant to your orator writs of subpoena to be directed to each of the said

defendants hereinbefore named, therein and thereby commanding them, and each of them, at a time certain and under certain penalty to be named, to be and appear before your Honors in this Honorable Court, then and there to answer all and singularly the matters aforesaid, but not under oath, answers under oath being hereby expressly waived, and stand and abide and perform such other and further orders or decrees as to your Honors shall seem just and meet.

[Seal]

NORTHWESTERN LUMBER COMPANY,

By C. F. JONES,

President.

BENJAMIN GROSSCUP and

WM. MORROW,

Solicitors for Complainant and of Counsel. [24]

United States of America,

Western District of Washington,

County of Pierce,—ss.

C. H. Jones, being first duly sworn, deposes and says that he is the President of the Northwestern Lumber Company, the above-named complainant; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true; that the seal affixed to said bill of complaint is the corporate seal of said complainant, and was affixed by its authority.

C. H. JONES.

Sworn to before me this 27th day of September,  
1911.

[Notarial Seal]      W. J. ELLIOTT, [Seal]  
Notary Public in and for the State of Washington,  
Residing at  
[Filed Sept. 29, 1911.]      [25]



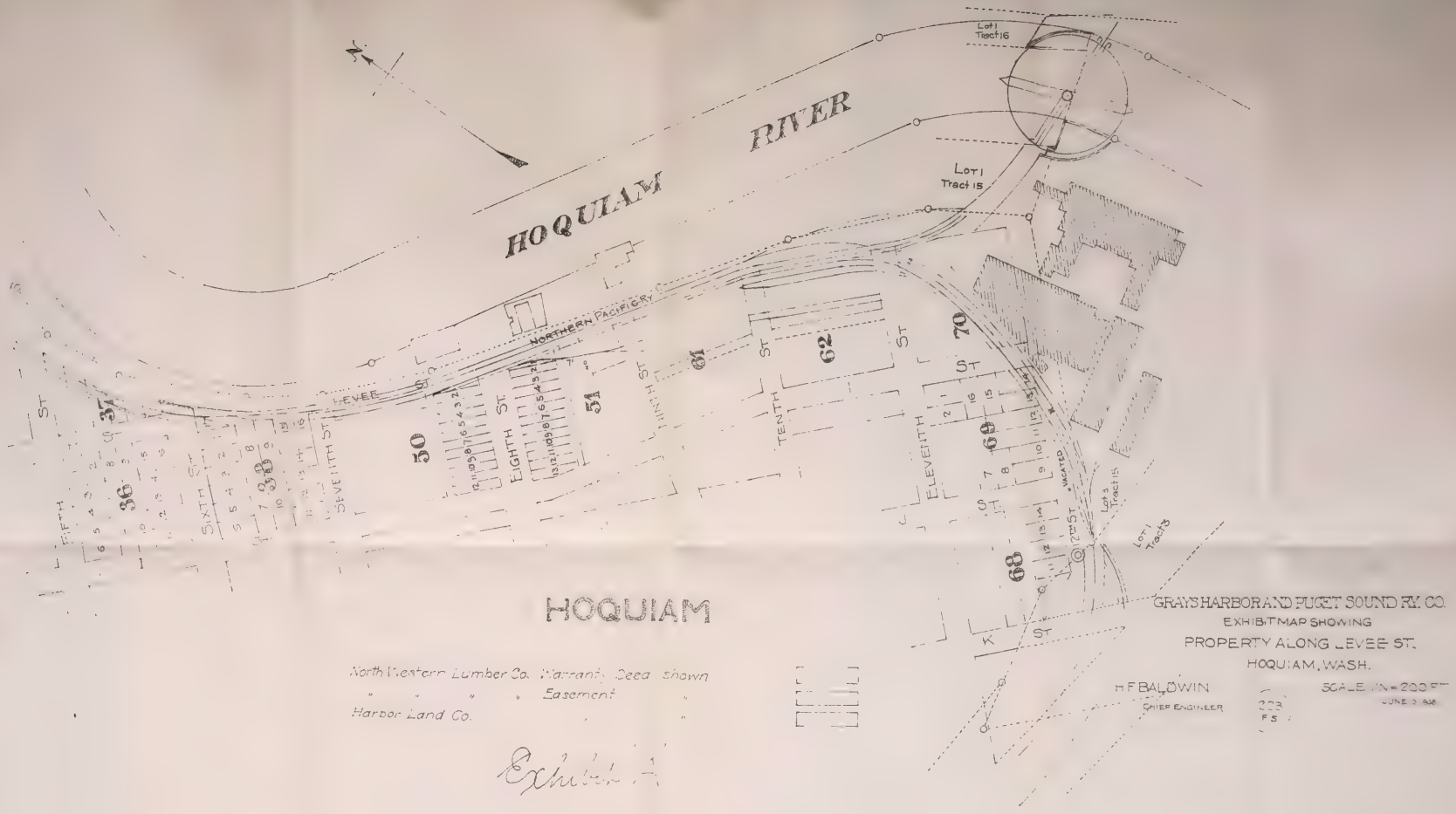
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Sworn to before me this 27th day of September,  
1911.

[Notarial Seal]      W. J. ELLIOTT, [Seal]

Notary Public in and for the State of Washington,  
Residing at

[Filed Sept. 29, 1911.]      [25]



North Western Lumber Co. Warrant, Deed, Shown  
Harbor Land Co. Easement

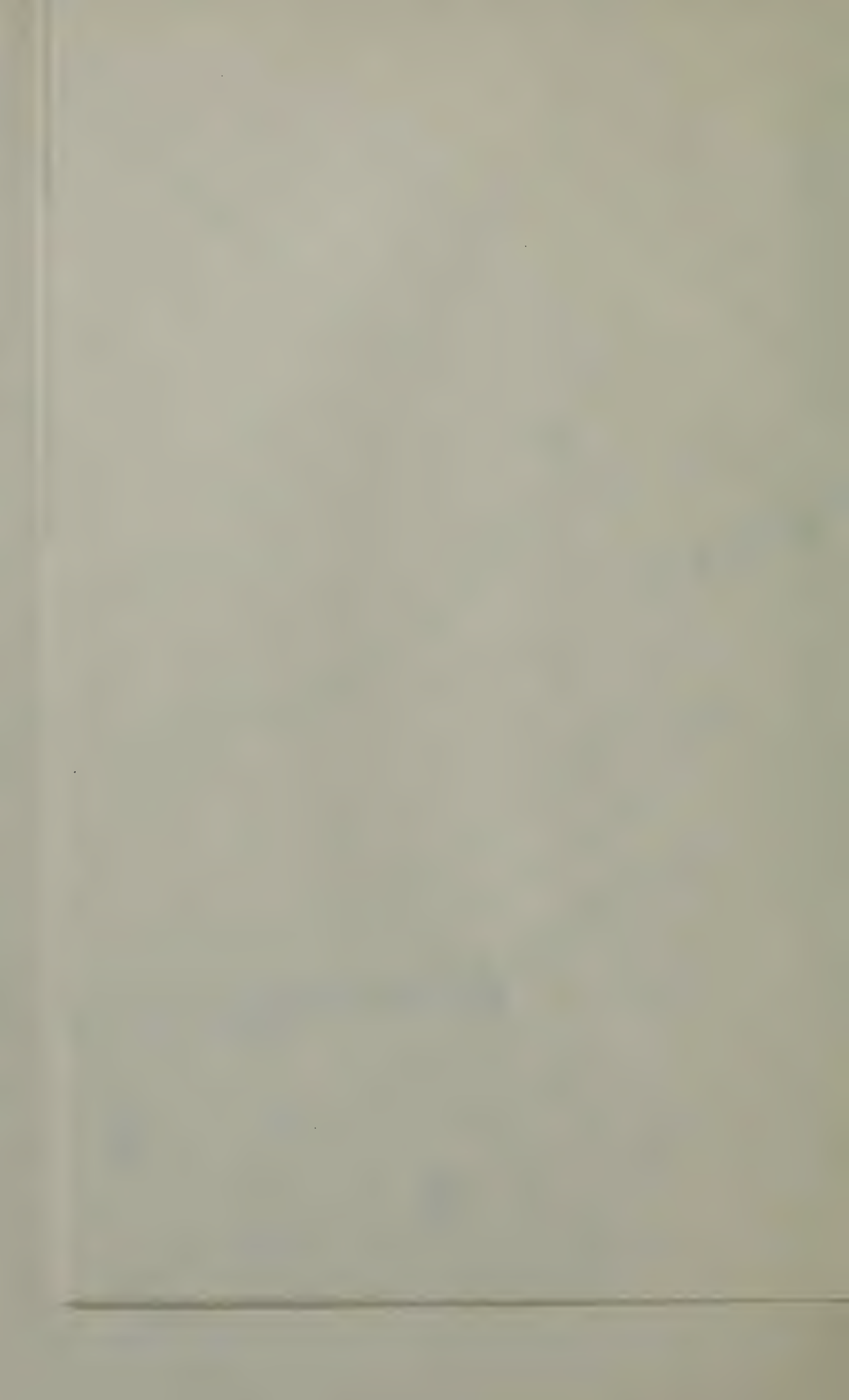
*Exhibit A*

H. F. BALDWIN  
CHIEF ENGINEER

223  
F.S.

SCALE 1" = 200 FT.  
JUNE 3, 1906





**Demurrer.**

The demurrer of Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, and Oregon-Washington Railroad & Navigation Company, defendants, to the Bill of Complaint of Northwestern Lumber Company, the above-named complainant.

These defendants, not confessing or acknowledging all or any of the matters or things in the said Bill of Complaint contained to be true, in such manner and form as they are herein set forth, demur to the said bill and for causes of demurrer, show:

**I.**

That it appears by the facts stated in complainant's own bill that it is not entitled to the relief prayed against these defendants.

**II.**

That there is no equity upon the face of said bill.

**III.**

That it appears by the said bill that neither the contract which is alleged by the said bill, and of which the complainant by the said bill seeks to have the benefit, nor any memorandum or note thereof, was ever signed by these defendants or either or any of them, or by any person authorized thereunto, within the meaning of the statute of the State of Washington for the prevention of frauds and perjuries.

**IV.**

That it appears by complainant's own bill that these defendants never reached a final agreement

with the complainant respecting the matters referred to in said bill, but that the matters therein referred to were matters of negotiation only, and [26] about which no final agreement was ever made by these defendants with the complainant.

## V.

That it appears by said bill that the complainant did not promptly elect to enforce specific performance of the alleged agreement against these defendants, or either of them, and that he has been guilty of such laches as should bar him from the relief prayed for in said bill.

## VI.

That the complainant has a full, adequate and complete remedy at law.

WHEREFORE, these defendants respectively demand judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill or to any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

BOGLE, GRAVES, MERRITT & BOGLE,  
Solicitors for Defendants.

(Verification.)

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

W. H. BOGLE,  
One of the Solicitors for Defendants.

(Filed Oct. 28, 1911.) [27]



**Memo. Opinion [on Demurrer to Bill].**

BENJAMIN S. GROSSCUP and WILLIAM  
C. MORROW, for Complainant.

BOGLE, MERRITT & BOGLE, for Defendants.

RUDKIN, District Judge. This is a bill in equity by a vendor for the specific performance of a contract for the sale of certain real property for right of way and other railroad purposes. It appears from the allegations of the bill that during the year 1908 the Grays Harbor and Puget Sound Railway Company was engaged in the construction of a railroad from the city of Centralia, in Lewis County, to the city of Hoquiam, in Chehalis County, in this State; that by and through its Chief Engineer, one H. F. Baldwin, it entered into negotiations with the complainant for the purchase of certain lands for right of way and other railroad purposes in the city of Hoquiam, and that pursuant to such preliminary negotiations, on the 25th day of September, 1908, the complainant made to the defendant, through its Chief Engineer, a written offer, embodying three separate and distinct propositions, the second and third of which are as follows:

“ ‘Simpson Avenue Line,’ with depot *grands* in Block 50. Across Northwestern Lumber Company’s log pocket on the extension of Simpson Avenue, which is across Lot 1 of Tract 15, Plat 9, Hoquiam Tide & Shore Lands; thence across or along Levee Street, adjacent to Block 70, 62, 61, eighty-eight feet

in Block 51 and two hundred and fifty feet, eleven inches, in Block 50, together with the return right of way through Blocks 62, 70 & 69, joining Northern Pacific right of way through those Blocks and through Lot 3, Tract 15, Plat 9, to Railroad Avenue, along Twelfth Street vacated and adjoining Northern Pacific [28] Track, to K Street. This right of way to be adequate for double trackage except on its return or switch track through Blocks 70, 69 and Twelfth Street. Also to include for depot grounds the East 182 feet of Block 50, all for the sum of \$102,000.00 One Hundred Two Thousand Dollars.”

“ ‘Emerson’s proposition.’ The same as Simpson Avenue Line omitting depot grounds in Block 50 and adding the East half of Blocks 62 & 61 and eighty-eight feet on Levee Street by 100 feet in Block 51, you to join with the Northwestern Lumber Company dedicating 50-foot street along the center line of Blocks 61 & 62, for the sum of One Hundred Thirty-four Thousand Dollars (\$134,000.00).”

This offer was accepted by letter of June 9, 1909, which reads as follows:

“We beg to advise you that we accept what is called the ‘Emerson’ proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for One Hundred and *Thirty-four* (\$134,000) *Dollars*.”

“We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers.”

“However, we will expect and you shall give us your co-operation in procuring other properties in



Hoquiam and also franchises in Hoquiam.”

“You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid sum. All buildings to be removed by you within six [29] months of the date of deed.”

This acceptance or proposition was in turn accepted by the complainant. Immediately thereafter Baldwin, acting for the defendant Railway Company, prepared and submitted a map showing in detail the land, right of way, and all property covered by the agreement, a copy of which is attached to the bill of complaint.

Under date of July 7, 1909, a formal written agreement was prepared by the attorney for the Railway Company, embodying the terms of the contract thus agreed upon. This agreement was executed by the complainant on the date of its preparation, but was never executed by the defendant. On the 15th day of September following the complainant requested a return of the written contract in question for some purpose not disclosed by the bill, aside from the fact that it had not received a duplicate executed by the Railway Company, as requested, and the agreement was thereupon returned, accompanied by the following letter:

“Per your request of this date I herewith hand you a proposed agreement between yourself as the party of the first part, and Grays Harbor and Puget Sound



Railway Company as the party of the second part, the same being with reference to the purchase of certain properties from you. Such agreement being dated July 7, 1909, and having been executed by you, but not by the Railway Company.”

“I consider that since this agreement has not been executed by the Railway Company, yet you are entitled to have it returned to you, but by so returning to you it is not the intention of the Railway Company to waive any rights which it has with reference to the agreement to purchase this property, and I anticipate that it is not your intention that the handing of these papers [30] to you should have that effect.”

The bill further avers that between June 9, 1909, and September 15, 1909, the general officers of the complainant and the general officers of the Railway Company, held frequent conferences; that the complainant immediately after the making of the agreement of June 9, 1909, began making preparations for the vacation of the property and for the construction of new buildings; terminated leases, etc.; that at such conferences the officers of the Railway Company were notified of such expenditures and such preparations; that notwithstanding such notice and knowledge the railway company indicated no intention or desire to cancel the contract, and that the expenditures so made exceeded the sum of \$50,000.

The bill further avers a readiness and ability on the part of the complainant to perform its part of the contract; the tender of a deed in June, 1911, and sets forth certain contracts and agreements between

the defendants which are not material to our present inquiry.

The defendants have interposed a demurrer to the bill for want of sufficient facts and the following suggestions have been presented to the Court in support of the argument on the demurrer:

The defendants contend, first, that there was no contract between the parties; second, that a part of the consideration for the contract was personal services to be rendered by the complainant for the Railway Company, and that in such cases specific performance will not be decreed; third, that the complainant was not the owner of all the property at the time the contract in suit was entered into; and, fourth, that the complainant has been guilty of laches.

[31]

1. While the acceptance by the Railway Company contemplated the *executed* of a formal written contract, pending the actual transfer of the property, yet the offer and the acceptance would seem to contain all the essential elements of a valid, definite, binding contract. They contain the names of the parties, the consideration, a description of the property, the time of payment, and even the nature of the instrument of conveyance, leaving nothing, it would seem, to be settled or agreed upon by future negotiations. The rule in such cases is, that where it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of the contracts are in all respects definitely understood and agreed upon, and that a part of the mutual



understanding is, that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement.

9 Cyc. 282.

The negotiations set forth in the bill of complaint would seem to satisfy the requirements of this rule. Doubtless the fact that the parties contemplated the execution of a future formal contract is some evidence that they did not intend that their previous negotiations should be final, and perhaps other extrinsic facts might be shown having a similar tendency, but I am nevertheless of the opinion that an enforceable contract is disclosed by the bill, and such seems to have been the view taken by the Railway Company itself when it returned the proposed written contract unexecuted.

2. No doubt where a substantial part of the consideration for a contract is personal services to be rendered by one party for the other, and such services have not been performed, a [32] court of equity will not, as a general rule, decree specific performance, for the Court will not create the relation of master and servant against the will of the parties, nor will it undertake *the* superintend the performance of a contract for services of that kind. This case, however, in my opinion, does not fall within the rule of law upon which the defendants rely. No definite services were agreed upon, nor was it at all certain that the co-operation of the complainant would ever be required. This provision of the contract was manifestly collateral to the main agreement, and was not a condition precedent to the



transfer of the property or the payment of the purchase price. The negotiations of the parties contemplated a transfer and payment in the near future,, while the services provided for might not be called for until a much later date, if at all. Furthermore, this part of the agreement is so general and indefinite as to the kind or character of the services to be performed, that it is doubtful if any action would lie for its breach unless the complainant, by some overt act, attempted to interfere in the acquisition of property or the obtaining of franchises.

3. The fact that the complainant was not the owner of all the property to be conveyed, at the time of the execution of the contract, is no objection to specific performance, especially where that fact was known to and within the contemplation of the parties to the contract at the time of its execution. If the complainant is possessed of a clear title and able, to convey at the date of the decree, equity as a rule requires no more.

36 Cyc. 627.

Hepburn vs. Dunlop, 1 Wheat. 179.

Day vs. Mountin, 137 Fed. 756. [33]

Such was the situation disclosed by the bill in this case.

4. There is nothing on the face of the bill to show laches on the part of the complainant, except the mere lapse of time from September, 1909, to June, 1911. This fact alone is not sufficient to constitute laches. As said by the Court in *Townsend vs. Vanderwelker*, 160 U. S. 171, 186:

“The question of laches does not depend, as does

the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

Within this rule I do not think that the mere lapse of two years is a bar to equitable relief, independent of the surrounding circumstances, which are not disclosed by the bill. This is especially true in view of the fact that the preliminary negotiations covered a period of a year, and almost nine months elapsed between the date of the offer and its acceptance. Extrinsic facts suggested on the argument would no doubt have a controlling effect on the question of laches. If, as suggested, the complainant demanded a return of the unexecuted contract in September, 1909, and took no steps to enforce the contract for a period of almost two years thereafter, and if in the meantime the Railway Company changed its position and acquired another right of way, a court of equity would hesitate long before decreeing specific performance. Again, if the Railway Company has acquired another right of way and constructed its road over the new line into the city, and will never require or use the right of way in controversy, the same rule ought to follow. The consideration of \$134,000 included the value of property taken, damages to [34] property not taken by reason of the taking of a part, and injury to property arising from the operation of trains. If the road is not built or operated, the complainant will never suffer the two



last elements of damage, and is here asking a court of equity to award him damages which he will never suffer. The Court is further asked to sever the title to this property by decree, in a manner which will necessarily be extremely prejudicial to both parties with no corresponding benefit to either. I doubt if a Court can be prevailed upon to grant such relief.

These last matters to which I have referred are outside of the record, but I deem the comment called for by the wide range taken on the oral argument. For aught that appears on the face of the bill, however, the demurrer should be overruled, and it is so ordered.

(Filed Feb. 2, 1912.) [35]

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**Separate Answer of Grays Harbor & Puget Sound  
Railway Company, Oregon and Washington  
Railroad Company and Oregon-Washington  
Railroad & Navigation Company to Bill of  
Complaint.**

To the Judges of the District Court of the United  
States for the Western District of Washington:

The joint and several answers of the Grays Harbor and Puget Sound Railway Company, Oregon and Washington Railroad Company and Oregon-Washington Railroad & Navigation Company to the Bill of Complaint herein:

These defendants respectively, now and at all times herein saving to themselves all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties



and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering say:

I.

They admit the allegations of paragraph I of said bill.

II.

They admit the allegations of paragraph II of said bill.

III.

They admit the allegations of paragraph III of said bill, except that they deny that said Baldwin was authorized to contract for any such property as alleged in said paragraph.

IV.

They admit the execution of the writing, as set forth in paragraph IV of said bill; but they deny that the same was intended by the parties thereto to be or constituted an acceptance of any proposition theretofore made by said *complain* [36] to said Grays Harbor Company; they admit that said Baldwin, after the execution of said writing, gave complainant a map, a copy of which is attached to said Bill of Complaint, marked Exhibit "A." They deny each and every allegation, matter, statement, and thing contained in paragraph IV of said bill, save and except as in this paragraph expressly admitted.

V.

Answering the allegations of paragraph V of said bill, they admit that complainant delivered Abstracts

of Title covering lands intended to be covered by said writing of June 9, 1909, to said J. B. Bridges, but they deny that said abstracts disclosed the power of complainant, Northwestern Lumber Company, to convey a clear and unencumbered title to all of said lands. They deny that it was understood by said Grays Harbor Company that title to any of said property stood of record in the name of any person or party other than complainant; and they deny that said Grays Harbor Company understood that complainant had power to contract for the sale of any such property standing in record in the name of any other person or corporation than said complainant, and deny that complainant had any such power or authority, or was able to deliver clear title thereto. They deny any knowledge or information thereof sufficient to form a belief as to the allegations in said paragraph V of said bill, that any conveyance or conveyances from any party or parties other than complainant, to any such premises, have been made, or that said complainant has been able or willing to make full, clear and unencumbered title to all of said premises.

## VI.

Answering the allegations of paragraph VI of said bill, they admit that said J. B. Bridges, acting as attorney for said Grays Harbor Company, submitted to complainant a draft of a formal agreement to be entered into between said company and complainant, [37] relative to the purchase and sale of the premises intended to be covered by said writing of June 9, 1909, and that such draft of agreement



was considered by said parties. They admit that said H. F. Baldwin died prior to July 2, 1909, and that said J. R. Holman became Chief Engineer of said Grays Harbor Company after the death of said Baldwin. They deny that said Holman, as such Chief Engineer and Right of Way Agent of said Grays Harbor Company, or otherwise, or said company, ever agreed with complainant upon the terms of a formal contract, as alleged in paragraph VI of said bill, or otherwise. They admit that said complainant signed and executed the so-called agreement set forth in said paragraph VI, which had been prepared by complainant; but deny that the same was ever agreed to or accepted by said Holman or said Grays Harbor Company.

#### VII.

They admit that complainant forwarded said so-called agreement so signed and executed by it to said Grays Harbor Company, at Seattle, Washington, accompanied by a letter, reading as set forth in paragraph VII of said bill; but they deny that it did so at the request of said Holman, or that the statements contained in said letter were known to said Holman, prior to the said letter being so sent by complainant, or that the same were acquiesced in by said Holman, and they deny the statements therein contained that the said so-called agreement was an agreement reached between said Grays Harbor Company and said complainant.

#### VIII.

They admit the allegations of paragraph VIII of said bill.



IX.

They admit that between June 9, 1909, and September 15, [38] 1909, the general officers of the complainant and officers of the Grays Harbor Company held frequent conferences, but they deny that said officers of said Grays Harbor Company did not at said conferences indicate a desire or intention to cancel said contract, if by such allegation as contained in paragraph IX of said bill is meant said so-called agreement so signed by complainant. Except as in this paragraph expressly admitted, they deny any knowledge or information thereof, sufficient to form a belief, as to any allegation, matter, statement or thing contained in paragraph IX of said bill.

X.

They deny that said complainant made any expenditures in changing its location, or the nature of its business, pursuant to any contract entered into between complainant and said Grays Harbor Company as alleged in paragraph X of said bill, and they deny any knowledge or information thereof sufficient to form a belief, as to whether or not said complainant did make any expenditures in changing the location or nature of its said business, as alleged in said paragraph.

XI.

To so much of said bill of complaint as alleges in paragraph XI thereof that said complainant has at all times since June 9, 1909, been ready and willing to enter into a formal agreement, in strict accordance with the terms of the contract consummated on

June 9, 1909, and to strictly comply with said agreement, these defendants say that the same is not true; that said complainant has never, to the knowledge of these defendants, been ready or willing to enter into a formal agreement, in accordance with any understanding or agreement between said complainant and said Grays Harbor Company; but as to whether or not said complainant is now ready and willing to enter into a formal agreement, in accordance with the intent of said writing of June 9, 1909, these defendants have [39] no knowledge or information sufficient to form a belief. They deny that the copy of the so-called agreement set forth in said bill and referred to in said paragraph XI is in form or substance according to the request of the agents or officers of said Grays Harbor Company.

## XII.

Answering the allegations of paragraph XII of said bill, they admit that on or about June 27, 1910, the defendant Grays Harbor Company entered into a contract in the form of a deed, duly acknowledged, with the defendant Oregon Company, wherein and whereby the Grays Harbor Company sold and conveyed to said Oregon Company all its property of every kind and character, including contracts, rights of way, franchises, powers and privileges, together with the right to enforce the same, but they deny that in and by said contract and deed said Oregon Company undertook or agreed to assume all of the obligations of said Grays Harbor Company, and they deny that by said contract and deed said Oregon Company became the owner of any rights in respect



to the property of said complainant, or any contract between said complainant and said Grays Harbor Company, or became obligated to discharge any such contract. They admit that on or about December 23, 1910, the said Oregon Company entered into a contract in the form of a deed, duly acknowledged, with the defendant Navigation Company, wherein and whereby the said Oregon Company assigned and transferred to said Navigation Company certain property, together with other property, acquired by the Oregon Company from the Grays Harbor Company, but they deny that any property of said complainant or any contract theretofore entered into between complainant and said Grays Harbor Company were included in said deed from said Oregon Company to said Navigation Company, and they deny that said Navigation Company, in and by said deed, agreed to assume and discharge [40] any obligation of said Oregon Company or of said Grays Harbor Company pertaining to any contract entered into between complainant and said Grays Harbor Company or said Oregon Company.

### XIII.

They admit that in the said deeds referred to in paragraph XIII of said bill, reference is made to a contract between said Grays Harbor Company and the defendant, the Milwaukee Company, wherein said Milwaukee Company acquired an interest in the property of the Grays Harbor Company, and that the defendants, Oregon Company and Navigation Company, took over said property charged with said interest, but they deny that said Milwaukee Company, in and by said contract or otherwise, has acquired



any interest in any property of said complainant, or assumed any obligation or liability respecting the same.

#### XIV.

They deny that complainant in June, 1911, or at any other time, tendered deeds conveying to the Grays Harbor Company clear title to all of the property intended to be covered by said writing of June 9, 1909, or by any contract theretofore entered into between said complainant and said Grays Harbor Company.

Further answering said bill of complaint, and as an affirmative defense thereto, these defendants severally allege and show to your Honors that the facts with reference to the matters and things mentioned and referred to in said bill of complaint are as follows, and not otherwise:

#### I.

That the said Grays Harbor Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Washington, duly incorporated therein prior to the year 1908, for the purpose of constructing and operating [41] a line of railway in said State of Washington, between the city of Centralia, in Lewis County, and the city of Hoquiam in Chehalis County. That the said Oregon Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Oregon, prior to the year 1909, for the purpose of constructing and operating a line of railway from the city of Portland, Oregon, to the city of Everett, Washington, and branch lines. That

the said Navigation Company is a corporation duly organized, created and existing under and by virtue of the laws of said State of Oregon, during the month of December, 1910, for the purpose of purchasing, constructing and operating railway lines in said States of Oregon and Washington. That said Milwaukee Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Washington prior to the year 1909, for the purpose of owning, constructing and operating lines of railway in said State of Washington and elsewhere.

## II.

That during the year 1908 said Grays Harbor Company, desiring to acquire lands for railway right of way purposes and for station grounds and railway yards, in said city of Hoquiam, Chehalis County, Washington, entered into negotiations with the said complainant, for the purpose of purchasing from said complainant such lands for such purposes, and for no other purposes whatever. That thereafter, and on or about September 25, 1908, during the course of such negotiations, the said complainant submitted to said Grays Harbor Company alternative propositions in writing, for the sale to said Grays Harbor Company of such lands for such purposes, which propositions are contained in the writing set forth in paragraph III of the bill of complaint herein. That said Grays Harbor Company did not [42] accept either of the propositions contained in said last mentioned writing, but such negotiations with reference to the purchase and sale of lands for



the purposes aforesaid were thereafter continued between the officers of said complainant and the officers of said Grays Harbor Company; and in the course of such negotiations, on or about the 9th day of June, 1909, H. F. Baldwin, who was then Chief Engineer of said Grays Harbor Company, made to said complainant a counter-proposition in writing for the purchase of lands for the purposes aforesaid, which counter-proposition is contained in the writing set forth in paragraph IV of said bill. That the said writing did not purport to contain, and it was not intended by the said Baldwin to contain, nor understood by the said complainant that it did in fact contain, all of the terms and conditions upon which the said Grays Harbor Company should purchase such lands, or upon which the said complainant should sell the same; but that it was intended and understood by both said parties at said time that the terms and conditions of such sale, and the agreements of the respective parties thereto in connection with the said purchase and sale of lands intended to be covered by said writing, should be thereafter agreed upon between the said complainant and the said Grays Harbor Company, and such agreement when reached, reduced to writing and signed by the said parties; and it was then well understood between the said parties that neither said proposition, nor the acceptance thereof by the said complainant, should be or constitute a binding agreement between the said parties, until the terms and conditions of such purchase and sale, and all matters connected therewith should be agreed upon by the said parties, and such



*Grays Harbor & Puget Sound Ry. Co. et al.* 51  
agreement reduced to writing and signed by them.  
[43]

### III.

These defendants further severally allege that the negotiations herein referred to between said Grays Harbor Company and said complainant were carried on in behalf of said Grays Harbor Company, during all of the times aforesaid, by the said Baldwin, who was then Chief Engineer of said Grays Harbor Company and by the Right of Way Agent of said company, but that neither said Baldwin nor said Right of Way Agent at any of said times had any power or authority to make any final or binding agreement with said complainant for the purchase of any lands for said Grays Harbor Company. That before any such final or binding agreement on behalf of said Grays Harbor Company for the purchase of such lands could be made, it was necessary that the same be accepted and approved by the General Officers of the said Grays Harbor Company. That said complainant at all times during the said negotiations well knew that neither said Baldwin nor said Right of Way Agent had any authority to make any final or binding agreement for the purchase of any lands for said Grays Harbor Company, and that before any such binding or final agreement could be made in behalf of said company, it was necessary that the same be accepted and approved by the general officers of said company.

### IV.

That after the writing of said letter of June 9, 1909, set forth in paragraph IV of the bill herein, and the acceptance thereof by said complainant, said

Baldwin submitted to said complainant a map of a portion of said city of Hoquiam, showing thereon the lands and premises intended to be covered and referred to by the said writing, a copy of which map is attached to said bill of complaint, marked Exhibit "A." [44]

V.

That shortly after said June 9, 1909, the said H. F. Baldwin died, and one J. R. Holman thereupon became Chief Engineer of said Grays Harbor Company; that after the writing and acceptance of said letter of June 9, 1909, the officers of said complainant company and said Baldwin during his lifetime, and said Holman thereafter, together with one J. B. Bridges, the attorney for said Grays Harbor Company, had numerous conferences for the purpose of agreeing upon the terms and conditions relative to the purchase and sale of the lands intended to be covered by said writing, and shown upon the said map, and all matters in connection therewith. That said Bridges prepared and submitted to said complainant a draft of an agreement to be entered into between the said parties covering the said matters, but that said complainant refused to accept or agree to the terms of said draft of agreement so prepared and submitted by said Bridges, and the said complainant prepared, signed and executed a so-called agreement between the said parties, a copy of which is set forth in paragraph VI of said bill of complaint, which writing contained other and different specifications and agreements than those contained in the draft of agreement so prepared and submitted



by said Bridges, which other and different terms and conditions had never been agreed to or accepted by any of the officers or agents of said Grays Harbor Company during any of the said conferences between said companies, or otherwise. And thereafter said complainant sent the said so-called agreement so signed and executed by it to the said Grays Harbor Company at its offices in Seattle, Washington, with the request that the same be executed by said Grays Harbor Company. That said Grays Harbor Company refused to accept the said agreement so prepared and executed by said complainant, and refused to accept or accede to the terms [45] and conditions therein contained different from the said draft so prepared and submitted by said Bridges, and repeatedly notified complainant that it would not accept the same nor execute the said agreement so submitted by said complainant.

## VI.

That thereafter said Grays Harbor Company, having refused to accept or execute the said agreement, the said complainant demanded a return thereof, and the said J. B. Bridges, who then had possession of said agreements, complying with the said demand of complainant, returned the said contracts to complainant, unexecuted by said Grays Harbor Company. That in returning the said contracts, said Bridges wrote said complainant a letter, a copy of which is set forth in paragraph VIII of said bill of complaint, but that the said Grays Harbor Company had accepted or agreed to a contract as so prepared and executed by said complainant, but that he did



mean by said letter that said Grays Harbor Company did not intend by the return of said so-called agreement to waive any right it might have to require complainant to make and enter into an agreement as contemplated by the said parties when said proposition of June 9, 1909, was made and accepted.

#### VII.

That thereafter numerous conferences were had between the officers of said complainant company and the said Holman and said Bridges, representing said Grays Harbor Company, concerning the terms and conditions of the said proposed purchase and sale, and the matters connected therewith, and the terms and conditions of the agreement which should be executed between the said parties relative thereto, which negotiations continued until the said conveyance and transfer of all the property and rights of said Grays Harbor Company to said Oregon Company, by the [46] said agreement and deed mentioned and referred to in paragraph XII of said bill of complaint. That during all of said negotiations, it was well known to complainant, and the fact was that said Holman did not have any power or authority to make final or binding agreement for said Grays Harbor Company to purchase any lands from complainant, but that before any such agreement could become binding upon said Grays Harbor Company, it was necessary that the same be accepted and approved by the general officers of said company.

#### VIII.

That after the said sale and transfer of the said property of the said Grays Harbor Company to the said Oregon Company in June, 1910, the said Ore-

gon Company, desiring to acquire lands in said city of Hoquiam, for railway right of way purposes, and for railway station grounds and yards, by and through the said J. R. Holman, who was during all of such times its Chief Engineer, had numerous conferences with the said complainant relative to the purchase of such lands for such purposes; that said Holman did not, during any of such negotiations, have any power or authority from said Oregon Company to make any final or binding agreement for the purchase of any of such lands, but before any such final or binding agreement could be made in behalf of said Oregon Company, it was necessary that the same be accepted by the Vice-president and General Manager of said company, which fact was at all times well known to said complainant. That such negotiations between said Oregon Company and complainant were continued until some time in the month of September, 1910, at which time all of such negotiations theretofore had between said complainant and said Grays Harbor Company and said Oregon Company, including the said proposition and acceptance of June 9, 1909, were by mutual agreement of the said parties, rescinded, [47] cancelled and terminated, and since said time, no negotiations have been had between the said parties relative to said matter, nor has any contract or agreement been made between them, and never since said time and *the* until the commencement of this action has the said complainant taken any steps, or given either of said defendants any notice of its desire or intention to enforce any alleged contract between complainant and either of said defendants, except that in June, 1911,



said complainant tendered to said Navigation Company certain deeds of property claimed by complainant to be covered by said writing of June 9, 1909, and then demanded a performance of a contract for the purchase of said lands which complainant then claimed had been theretofore entered into.

### IX.

These defendants further severally allege that after the said termination of said negotiations, and the said cancellation and rescission of said proposition and acceptance, the said Oregon Company on or about the 23d day of December, 1910, sold and conveyed all of its lines of railway in the State of Washington and elsewhere, including said line of railway from Centralia, Washington, to Hoquiam, Washington, to the said Navigation Company, and since such conveyance, the said Oregon Company has not owned, constructed or operated, and does not intend to purchase, own, construct or operate any line of railway in said State of Washington. That after the said termination of said negotiations and the cancellation and rescission of said proposition and acceptance, the said Oregon Company, relying thereon, and upon the failure of said complainant to make any claim that any final or binding contract had been made between it and either of said defendants for the purchase and sale of any such property, or to notify either of said companies that it intended to make any such claim, [48] or to attempt to enforce any alleged contract between said parties, and believing that said complainant did not intend to claim that any final or binding contract had ever been made with either of these defendants for the sale or purchase of any lands



for said right of way, station and yard grounds, acquired other railway right of way, and railway station and yard facilities in the said city of Hoquiam, and has constructed its railroad over such new line into said city of Hoquiam; and neither of said defendants will ever require or be able to use the lands or premises, or any part thereof, intended to be covered by the said writing of June 9, 1909, for railway purposes, or for any purpose for which it desired to purchase the same, or is authorized and empowered to use lands under its Articles of Incorporation.

X.

These defendants further severally allege that it was understood and intended by and between the said complainant and said Grays Harbor Company that the said sum of One Hundred and Thirty-four Thousand Dollars (\$134,000.00) should be paid to said complainant, as and for complainant's damage to other property adjoining that proposed to be purchased from complainant as aforesaid, by reason of the construction, maintenance and operation of a line of railway upon the said property, as well as for the purchase price of such land to be taken. That by reason of the fact that no line of railway has been or would be constructed or operated over the said premises which complainant now asks this Honorable Court to require these defendants to purchase, the said complainant would not suffer any damage to its said other property, as was contemplated in and by the said proposition of June 9, 1909, and to require these defendants to pay said complainant said sum of One Hundred and Thirty-four Thousand

Dollars (\$134,000.00) for a conveyance of the said property, would compel these [49] defendants to pay complainant, and permit complainant to receive damages which it never has and never will sustain; that to compel these defendants to purchase the said premises for said sum of One Hundred and Thirty-four Thousand Dollars (\$134,000.00), and separate the said premises from the other premises owned by said complainant in connection therewith, would require a severance of the title of said property in a manner which would necessarily be extremely prejudicial to these defendants, as well as to said complainant, with no corresponding benefit to either of said parties.

## XI.

These defendants further severally allege that a further part of the consideration for which said Grays Harbor Company proposed to pay complainant said sum of One Hundred and Thirty-four Thousand Dollars (\$134,000.00), was what said complainant, its officers and agents, should co-operate with said Grays Harbor Company and its successors, in procuring other necessary properties in said city of Hoquiam, and procuring from said city of Hoquiam proper and necessary franchises for the construction and operation of its railway in said city. And these defendants allege that said complainant did not at any time after making said proposition and acceptance of June 9, 1909, co-operate with or assist either of these defendants in procuring other properties in the city of Hoquiam, required or desired by these defendants, nor co-operate with them in procuring



necessary or proper franchises from said city of Hoquiam; but, on the contrary, the said complainant, at numerous times thereafter, opposed the applications of these defendants for franchises before the City Council of said city of Hoquiam, and in many ways hindered and obstructed these defendants in obtaining necessary and proper franchises from said city. [50]

## XII.

That by reason of the facts hereinbefore stated, these defendants allege that said complainant should now be estopped to claim that any final or binding contract or agreement, with reference to the purchase and sale of any property, was ever made between complainant and said Grays Harbor Company, or said Oregon Company, or said Navigation Company; and that to grant the prayer of said bill of complaint, for a specific performance of any such alleged agreement, or to require these defendants, or either of them, to make or enter into any agreement with complainant, for the purchase of any property in said city of Hoquiam, as prayed for in said bill, would be unjust and inequitable.

WHEREFORE, these defendants, having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of complaint material to be answered, according to their best knowledge or belief, humbly pray this Honorable Court to enter its judgment and decree that these defendants, respectively, be hence dismissed with their



respective costs and charges in this behalf most wrongfully sustained.

GRAYS HARBOR & PUGET SOUND  
RAILWAY COMPANY.

By BOGLE, GRAVES, MERRITT & BOGLE,  
Its Solicitors.

OREGON AND WASHINGTON RAIL-  
ROAD COMPANY.

By BOGLE, GRAVES, MERRITT & BOGLE,  
Its Solicitors.

OREGON-WASHINGTON RAILROAD &  
NAVIGATION COMPANY.

By BOGLE, GRAVES, MERRITT & BOGLE,  
Its Solicitors.

BOGLE, GRAVES, MERRITT and BOGLE,  
Solicitors for Answering Defendants and of Counsel.

(Filed April 9, 1912.) [51]

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**Opinion.**

GROSSCUP & MORROW, for Complainant.

BOGLE, GRAVES, MERRITT & BOGLE, for  
Defendants.

CUSHMAN, District Judge.

Complainant relies upon the following author-  
ities:

Windsor vs. St. Paul &c Ry. Co., 37 Wash., 156;  
No. American Trans. Co. vs. Samuels, 146 Fed.,  
51;

Bradley vs. Steam Packet Co., 13 Pet., 89;  
Sultan Log. Co. vs. Great Northern, 58 Wash.,  
604;

Anderson vs. Lumber Co., 30 Wash., 147;  
Moses vs. Bank, 149 U. S., 298;  
Breasher vs. West, 5 Pet., 609;  
McLean vs. Sellers, 120 Pac., 242;  
Marvin vs. Lindbach, 80 Atl., 958;  
Johnson vs. Tribby, 27 App. D. C., 281;  
Willard vs. Taloe, 8 Wall. 557;  
Morgan vs. Bell, 3 Wash., 570;  
Pomeroy's Equity Jurisprudence, Sec. 842;

[52]

Frye on Specific Performance, Sec. 258;  
Storer vs. Great Western Ry., 2 Young & Col-  
lier Chancery Rpts., 48;  
Pembroke vs. Thorpe, 3 Swanston's Ch. Rep.,  
482;  
Hawkes vs. Eastern Counties Ry., 22 Chan-  
cellor's Reports, 739;  
Cathcart vs. Robinson, 5 Pet., 277;  
Kentucky Distilleries &c Co. vs. Blanton, 149  
Fed., 40;  
Taylor vs. Insurance Co., 9 How., 390-405;  
Eames vs. Insurance Co., 94 U. S., 621;  
Defendants rely upon the following authorities:  
Swash vs. Sharpstein, 14 Wash., 426;  
Hite & Raffeto vs. Savannah Elec. Co., 164 Fed.  
944;  
Crossley vs. Maycock, 18 Eq. Cs., 180;  
Clark vs. Davidson, 10 N. W., 384;  
Ellis vs. Cary, 42 N. W., 252;  
Brown on St. Frauds, Sec. 376;  
Sorenson vs. Kizer, 51 Fed., 30;  
Bailey vs. R. R. Co., 17 Wall, 96;

Blake vs. Co., 76 Fed., 654;

DeWitt vs. Berry, 134 U. S., 306;

Johnson vs. Lara, 50 Wash., 368;

Allen vs. Treat, 48 Wash., 552;

Hogan vs. Kyle, 7 Wash., 600;

Peters vs. Van Horn, 37 Wash., 550;

Morgan vs. Bell, 3 Wash., 554; 565;

3 Pom. Eq. Jur., Sec. 1410;

McKinney vs. Big H. & C. Co., 167 Fed., 770.

[53]

This cause is for decision upon the bill, answer, reply and evidence thereunder. The bill is one for specific performance. Complainant is, and was, the owner of a large amount of real estate in the town of Hoquiam, and otherwise interested in certain business enterprises at that place.

The defendant, Grays Harbor & Puget Sound Railway Company, was, in 1908, seeking to obtain an entrance for its road to Hoquiam, and to acquire depot and terminal grounds, right of way and franchises therein. The other defendants have succeeded to, or acquired interests from the Grays Harbor & Puget Sound Railway Company, the nature of whose rights and liabilities among themselves, it is not necessary to state. They will be mentioned herein as "defendants."

Through the chief engineer of said railroad company, it entered into negotiations with complainant, which resulted in complainant, in September, 1908, submitting three separate propositions to the defendant railroad company, through the latter's engineer. The second and third propositions were:



“ ‘Simpson Avenue Line,’ with depot grounds in Block 50. Across Northwestern Lumber Company’s log pocket on the extension of Simpson Avenue, which is across Lot 1 of Tract 15, Plat 9, Hoquiam Tide & Shore Lands; thence across or along Levee Street, adjacent to Blocks 70, 62, 61, eighty-eight feet in Block 51 and two hundred and fifty feet, eleven inches, in Block 50, together with the return right of way through Blocks 62, 70 and 69, joining Northern Pacific right of way through those Blocks and through Lot 3, Tract 15, Plat 9, to Railroad Avenue along Twelfth Street vacated and adjoining Northern Pacific Track, to K Street. This right of way to be adequate for double trackage except on its return or switch track through Blocks 70, 69 and Twelfth Street. Also to include for depot grounds the East 182 feet of Block 50, all for the sum of \$102,000.00, One Hundred Two Thousand Dollars.”

“ ‘Emerson’s Proposition.’ The same as Simpson Avenue Line omitting depot grounds in Block 50 and adding the East [54] half of Blocks 62 and 61 and eighty-eight feet on Levee Street by 100 feet in Block 51, you to join with the Northwestern Lumber Company dedicating 50-foot street along the center line of Blocks 61 & 62, for the sum of One Hundred, Thirty-four Thousand Dollars (\$134,000.00).”

In June, 1909, this offer was conditionally accepted by a letter from the railroad company’s engineer to complainant, stating:

“We beg to advise you that we accept what is called the ‘Emerson’ proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for One Hundred and *Thirty-four* (\$134,000) *Dollars*.

“We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers.

“However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.

“You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid sum. All buildings to be removed by you within six months from date of deed.”

This, in turn, was accepted by the complainant. Thereafter a map was presented to complainant by the defendant's engineer. This map showed the location of a railroad bridge across the river in Hoquiam. Abstracts were, without delay, furnished the attorney of the defendant railroad company. These abstracts disclosed good title to the property, save in certain particulars, not material.

In June, 1909, the engineer of the defendant railroad company, who had conducted the negotiations,



died, being succeeded, July 1, 1909, by Mr. J. R. Holman. There were conferences between the representatives of the parties upon the terms and details of the formal contract, mentioned in the defendant's acceptance. [55]

The attorney for the railroad company and George H. Emerson, Vice-president of complainant, at length so far agreed upon a form of contract as to dictate a draft to complainant's stenographer, which was submitted to the President of the complainant company. It contained the following provision:

"7th. It is agreed by the said first party and their officers, that they will co-operate with the said second party in procuring such franchises of the City of Hoquiam as it may desire and in procuring such additional rights of way in the City of Hoquiam as the second party may desire."

The President of complainant refused to execute the contract until another paragraph was inserted, providing:

"8th. It is stipulated by the first party that the construction of the approach to the proposed bridge on the extension of Simpson Ave. shall be so arranged as to interfere with the handling of logs in their mill pond the least possible, and with that object in view that an ample span shall be placed West of the West pier of the drawbridge, and that the bridge abutment be placed as nearly as possible, consistent with the economical spacing of the spans of said bridge, and in accordance with the requirements



of the U. S. Government, about thirty ft. into the river from the line of the piles of the first party's pond as such piles are now driven. It is also further stipulated by the first party that such bridge may be a joint user bridge with the City of Hoquiam provided the City of Hoquiam contributes its share of cost of construction and maintenance."

The following provision was also inserted:

"1st. The said party of the first part for the consideration of \$134,000.00, to be paid by second party, *Twenty Thousand Dollars of which is paid down by second party, the receipt* whereof is hereby acknowledged, and the covenants and agreements hereinafter mentioned \* \* \* "

The contract, as then prepared, was on July 7, 1909, forwarded to the Railroad Company at Seattle by complainant; but was returned, unexecuted, July 21st to the attorney of the Railroad Company in Hoquiam, by Mr. Holman—who had, on July 1st, succeeded to the position of engineer for the railroad company, after the decease of Mr. Baldwin. This attorney, July 23d, advised complainant that the railroad company [56] would not execute the contract on account of its containing, in paragraph 8, the "common user" bridge clause.

Conferences were had between the officers of complainant and the attorney of the railroad company, trying to reach an agreement concerning the objectionable provision; but without being able to do so. Thereafter on September 15th, complainant demanded that the attorney for the railroad company

return this formal contract to it, which he did on the same day, with the following letter:

“Per your request of this date I herewith hand you a proposed agreement between yourself as the party of the first part and Grays Harbor and Puget Sound Railway Company as the party of the second part, the same being with reference to the purchase of certain properties from you. Such agreement being dated July 7, 1909, and having been executed by you, but not by the Railway Company.

“I consider that since this agreement has not been executed by the Railway Company yet you are entitled to have it returned to you, but by so returning to you it is not the intention of the Railway Company to waive any rights which it has with reference to the agreement to purchase this property and I anticipate that it is not your intention that the handing of these papers to you should have that effect.”

The attorney testifies that the immediate surrender of the prepared draft being required, and having no time to confer with his company, he wrote this letter. Complainant made no answer to it, and negotiations were suspended.

The Railroad Company thereafter negotiated with the City authorities and with a so-called “Citizens’ Committee” concerning the contemplated bridge. Officers of the complainant were present at certain of these negotiations, and its manager was accused, by defendants, of opposing the Railroad Company in this matter.



In June, 1910, the Grays Harbor & Puget Sound Railway Company sold all of its property to the Oregon & Washington Railway Company. At length, the Railroad Company, on September 9, 1910, reached an agreement with the "Citizens' Committee" concerning the bridge, by which it was provided [57] that it should not be a "common user" bridge.

After this matter was so arranged, the engineer of the defendant railroad, on the same day, notified the complainant that it was ready to take up the deeds to the property desired. Upon this request, Mr. Jones, the President of complainant, met with the engineer and attorney for the defendant railroad. There is a conflict in the testimony of these men as to exactly what took place at this interview. The attorney and engineer for the railroad company testify that Mr. Jones demanded \$144,000.00 for the property, being \$10,000 more than the price made in the accepted proposition, which the engineer refused, and that Mr. Jones informed them that it could not be had for less. Mr. Jones testifies that he represented to the engineer that the complainant should receive interest on the \$134,000—the original price, for the length of time that had elapsed since the acceptance. Interest on \$134,000, at six per cent, from June 9, 1909, to September 9, 1910, would slightly exceed \$10,000.

It is probable that Mr. Jones demanded \$144,000, and he probably called attention to the fact that interest during the delay would amount to as much as the extra amount demanded. Not only do the attorney and engineer testify that Mr. Jones made



a positive demand for the amount in excess of the agreed price, but Mr. Emerson, complainant's Vice-president, testifies that he understood Mr. Jones had made a demand for interest. The complainant has been, at all times, in possession of the property.

Complainant now contends that this was not a breaking off of negotiations, nor a refusal on its part to perform, but simply a request of its President that, before carrying out the contract, Mr. Holman submit to his superiors the claim [58] of complainant, that it be allowed interest on the purchase price. It cannot be so held. If such was the understanding of those present, or of Mr. Jones, the complainant's President, the matter would, in all probability, soon have been broached again, but this was not done.

In December, 1910, the Oregon & Washington Railway Company sold its property to the Oregon-Washington Railroad & Navigation Company. Defendant's engineer continued to treat with the city authorities and, at length, the railroad company entered into a traffic arrangement with the Northern Pacific, thereby obtaining an entrance into Hoquiam, and its trains came in over the tracks of that company. Upon learning which, complainant tendered deeds to the property to the defendant railroad company—reciting a consideration of \$134,000—and demanded performance of defendant; and, upon refusal, instituted this suit to compel defendants to specifically perform the foregoing agreement.

A "common user" bridge would have been a benefit to complainant and its other property. Much

had, doubtless, been said in the negotiations concerning this bridge, but the evidence does not disclose an agreement. No mention is made of it in either of the letters containing the proposition and acceptance. And, when, by the provision contained in paragraph 8 of the formal contract, the complainant sought to bind the railroad company to a partnership with the city in a "common-user" bridge, it was requiring the making of a new contract and, whether this be viewed as showing that the minds of the parties had not really met, though, *prima facie*, it appeared by the original offer and acceptance that they had met; or as a refusal by complainant to perform—the refusal being put in the shape of a demand not contemplated—is all one, for the effect is [59] the same.

"If we assume that the offer and acceptance is, *prima facie*, evidence of a contract, it is, of course, the contract embraced by the written offer and no other. What is to be inferred by the preparation and presentation by Nash of the formal writing differing in terms from the offer accepted? If he was acting in good faith, the writing prepared by him must be his interpretation and construction of the offer to sell which had been accepted, and if that be true, with the written offer before us, we would be forced to conclude that there was nothing to show that the sellers had made the agreement as construed by Nash. This would lead to the conclusion that the minds of the contracting parties had not met, and that, although the offer and



its acceptance was apparently a completed contract, the subsequent occurrences showed that, in fact, there had not been an agreement. But if the offer and its acceptance did, as matter of law, make a contract, it should not be held, and we do not hold, that the subsequent action of the buyer rescinded or canceled it. This plainly could not be done against the wishes of the sellers. Such action could not do more than extend to the sellers the opportunity to withdraw their offer.

“If, on the other hand, we infer that the offer was so plain that Nash must have understood its terms, and that the formal writing prepared by him does not present his construction of the offer, but that it is a counter proposition made by him, or an effort to obtain better terms than those embraced in the offer, what then should follow? If the offer and its acceptance was not binding on the buyer, it was not binding on the sellers; for it is axiomatic that, unless both are bound, neither will be bound. Bishop on Contracts, sec. 78. If the buyer was free to propose new terms, the sellers were free to decline them. In suggesting new terms, the buyer, in effect, said that the offer and acceptance was not final. If not final as to the buyer, it could not be conclusive as to the sellers, and they were free to withdraw from the negotiations. *Bristol etc. Co. vs. Maggs*, 44 Ch. Div. L. R. 618; *Johnson vs. Latimer*, 71 Ga. 470. See, also, *Bellamy vs. Debenham*, 45 Ch. Div. L. R., 481; s. c., on ap-



peal, 1 Ch. Div. (1891) L. R. 412. The buyer should not be permitted to treat the negotiations as open for the purpose of seeking better terms, and, at the same time, hold them closed so as to bind the sellers if they fail to accept the proposed changes. When it proposes a contract materially variant from the offer, it takes the position that the acceptance of the offer was not unconditional and conclusive. The contract for the breach of which this suit is brought is the offer to sell and the acceptance of the offer. If they stood alone, as we have said, they would contain apparently all the elements of a contract. It seems to us that we cannot be required to stop at the acceptance and refuse to consider what followed. Nash immediately proceeded to prepare the formal writing. It was ready for signing on the next day. If it could have been finished instantly when the offer was accepted, and if Nash could have handed the sellers his draft of the formal contract at the moment of acceptance, the acts all taken together would have meant an acceptance of the offer, with the understanding that it be construed to mean [60] what Nash proposed in the new writing. Clearly the first offer would not bind the buyer until it was unconditionally accepted, and the new writing would not bind the sellers, it containing new terms, until they agreed to it. *Crossley vs. Maycock*, 18 Eq. Cas. 180." *Hite & Rafetto vs. Savannah Elec. Co.*, 164 Fed. 944, at pp. 951 and 952.

It was argued, on behalf of complainant, that the 8th paragraph was no departure from, or variation of the original contract; that it was only putting in form what the parties had agreed concerning one of those franchises to be asked from the city. It may have been complainant's understanding; but it is not shown that the railroad company so agreed, or understood. It is urged that the evidence as to those negotiations does not tend to vary the terms of the written contract, but only to disclose the subject matter referred to as "franchises in Hoquiam," mentioned in the railroad company's acceptance of complainant's proposition.

If it were conceded that "franchises in Hoquiam" might be shown to contemplate franchises in particular places in Hoquiam, and not such franchises as the railroad company then, or thereafter concluded that it desired, yet it would be an abuse of the exception to the rule to go further and hold that the particular form of franchise in contemplation was to be limited and burdened in the manner sought by the last clause of paragraph eight, and parol evidence to substantiate such claim, would constitute an unwarranted variation of the contract.

A formal contract was contemplated when the letter of acceptance was written. If the formal contract had been made, the preliminary arrangement made by letter would be *functus officio*—either the letters would, of necessity, have formed the contract, or the formal instrument would have done so. The letters disclose certain main considerations for the contract, but much of detail in them was left unex-



pressed, [61] as is disclosed by the provisions in the formal draft, concerning which there is no dispute.

These specifications, in the letters would hold the parties to the main provisions of the proposition, where they could not break them, or, if they did, it would be clear who was wrong. If, when they came to enter into a formal agreement, one side or the other refused to subscribe to one of these main propositions, the right of the matter could be easily determined. But when, in the preparation of the formal agreement, the parties find, although honestly striving, that they cannot agree on some matter unexpressed in the original agreement made by the letters, then the Court must conclude that their minds have not met. The formal agreement then becomes a prerequisite to the consummated contract. A breach cannot be determined because the parties, themselves, by providing, specially, for a formal agreement, have provided against the very thing that happened. If, when the letters were written, they considered it necessary to provide against this contingency, by requiring a formal contract, the Court cannot undertake to interpret the unconsummated agreement and make a contract for them.

It is further urged that the contract is not varied by paragraph eight; that it was a requirement called forth by the language of paragraph seven, the latter having been inserted at the dictation of the attorney for the railroad company; that paragraph seven is broader than the provisions contained in the original acceptance, which acceptance read: "franchises in Hoquiam," while paragraph seven reads:



“Such franchises of the City of Hoquiam as it may desire and in procuring such additional rights of way in the City of Hoquiam as the second party may desire.”

Paragraph seven is not a substantial broadening or variation of the language contained in the acceptance. The [62] situation of the parties and the magnitude of the enterprise undertaken by the defendant render it unlikely that each and all of the franchises necessary to its undertaking had been determined upon by the engineer. It is more reasonable to think that the provision in the acceptance contemplated, not only franchises then deemed necessary by the defendant railroad company, but those which, in the progress of its undertaking, would be found necessary and desirable.

Literally, “franchises in Hoquiam” is broader and more comprehensive than “such franchises in Hoquiam as we may desire,” for the former would include those desired and those not. The letter of acceptance did not fairly contemplate any limitation other than that the franchises should be in Hoquiam. The addition limited, rather than broadened the original language. The map mentioned in the acceptance and furnished complainant shows that a bridge was contemplated at the point in question. Therefore, the issue between the parties was whether the franchise for this bridge should be such as complainant desired, or as defendant desired. The latter is the more likely.

Parol testimony will be admitted to disclose the situation of the parties to a contract, but this is as far as the statute of frauds may be relaxed in allow-

ing evidence to make plain the contract.

While, doubtless, the more important franchise requirements had been determined upon, yet, at the stage at which the project then was, naturally, all franchises to be asked of the city could not be foreseen and, whether in fact they had been foreseen or not, an engineer of ordinary prudence would hesitate to act on the assumption that he had foreseen everything. It is, therefore, reasonable to conclude [63] that the language used in the acceptance must have been used in at least as broad a sense as that expressed in paragraph seven.

It is further concluded, as a matter of fact, that the objectionable clause in paragraph eight was insisted upon by complainant, as pointed out above, rather for its own advantage and protection—in a matter deemed necessary by it, than on account of the language of paragraph seven. The complainant could have protected itself against paragraph seven by stipulating that it be not required to co-operate with defendant for other than a “common user” bridge, without stipulating that the bridge be a “common user” bridge, thus binding defendant to accept a “common user” bridge.

It is argued that no demand was made upon the complainant to execute a contract, from which paragraph eight was omitted. As pointed out, one was prepared and submitted to complainant in which this objectionable paragraph was omitted. At the dictation of complainant’s president, it was re-drafted to include paragraph eight and was, in that form, executed by him for complainant. The Vice-President of the complainant testifies that Mr. Jones, its Presi-



dent, only signed the contract containing the "common user" bridge clause, his testimony being as follows:

"Q. Is it not a fact that the only agreement Mr. Jones was willing to sign was the one containing the bridge clause?

"A. The only one he was willing to sign was the one he did sign, and it contained a bridge clause."

This sufficiently shows a refusal by complainant to execute a contract that did not include paragraph eight.

It is argued that the formal agreement called for in the acceptance is waived both by the letter of the attorney of the railroad, returning, unexecuted, the prepared draft, [64] and the conduct of the parties. So far as this letter is concerned, if it were conceded that the attorney had the authority to change the contract, he did not waive any right on account of a breach of the contract. If the prepared contract had simply been returned without comment or demand, no rights would have been waived. The attorney's letter no more than called the attention of complainant to the fact that no acknowledgment was made by the return of the demanded instrument of a changed situation, or the loss of any right on account of a breach, or otherwise, that the railroad had not surrendered any rights by the surrender of this paper.

In so far as the contention that the conduct of the parties constituted a waiver of the formal agreement is concerned, the evidence warrants no other conclusion than that, when they found that an agreement



could not be reached on account of the "common user" bridge clause, insisted upon by complainant, matters were left in abeyance—as each party desired the consummation of the entire transaction—while the railroad treated with the city in regard to the bridge, it being the plan of each to resume negotiations when the bridge question was settled.

Such conduct does not constitute a waiver of the formal contract. It might constitute a waiver of the time contemplated within which it was to be entered into. It is no more than saying "We cannot agree now. We will wait and see if we cannot agree later."

Nothing was done towards acceptance or performance by either party. It is argued that the removal of certain buildings from the land by complainant was such part performance as to take the contract out of the statute of frauds. These buildings were not moved at the request of the railroad [65] company. The acceptance provided that the buildings upon the land should be removed within six months from the date of the deeds.

The mere removal of buildings would not constitute such part performance of this contract as to take it out of the statute of frauds, because in the nature of things it could not be made to appear that it was solely done as performance and not for other reasons. Further, the evidence is not sufficient to warrant a finding that the defendant knew that they were being removed in performance.

Complainant contends that it was warranted in removing the buildings upon the assumption that the defendant would take the land, because it was known that the defendant railroad was continuing its nego-

tiations with the city of Hoquiam for its contemplated franchise. Complainant may have been influenced by this fact in the course pursued by it; but that fact does not give it any legal or equitable right against the defendant company. There was no privity between it and the city in this matter. The removal of the buildings would not be a sufficient part performance, in any event, to take the contract out of the statute of frauds.

“By the weight of authority at this time the rule seems to be settled that in order to enforce specific performance of a parol contract to convey land, possession must have been transferred. The Supreme Court of the United States, in *Purcell vs. Miner*, 4 Wall. 513, decided in 1866, strongly support this doctrine. *Pond vs. Sheehan*, *supra*, decided by the Supreme Court of Illinois in 1890, holds that delivery is essential. Many other cases are cited in the opinion there rendered. *Johns vs. Johns*, 67 Ind. 440, holds likewise, and the Supreme Court of Pennsylvania, in the case of *Pugh vs. Good*, 3 Watts & S., 56 (37 Am. Dec. 534) holds that delivery of possession pursuant to the contract is the test of part performance. We shall not call attention to all of the cases so holding, but there is another line which, while not directly passing upon this question, holds that a part performance by one of the parties is not sufficient and that there must have been a part performance by the other party also. Some of them are *Wallace vs. Long*, 105 Ind. 522 (55 Am. Rep. 222, 5 N. E. 666); *Austin vs. Davis*, 128 Ind. 472 (25 Am. St. Rep. 456, 26



N. E. 890) and *Ellis vs. Cary*, *supra* (74 Wis. 176, 17 Am. St. Rep. 125, 42 N. W. 252). *Swash vs. Sharpstein*, 14 Wash. 426, at 436. [66]

Whether a formal agreement was waived by the defendant, either by its conduct at the time of the halting of negotiations, on account of a disagreement over the "common user" bridge clause, or upon the engineer's informing complainant's president that he was ready to take up the deeds, in September, 1910, is not important, as it is clear that the complainant, through its president, refused to perform its part of the contract and demanded \$10,000 additional compensation to that agreed upon. The complainant's demand and refusal excused the defendant from making any further offer, as a useless formality, and it makes no difference whether the offer of \$134,000 by defendant's engineer be considered as an assertion by him that the contract was still in force, or as an offer to pay the price before offered.

The complainant having refused to perform what it now claims was the contract, and the defendant having acquired other property for the purposes desired, it is now excused from performance and a rescission of the contract should be decreed.

For the reasons above stated, complainant was not entitled to anything in the nature of interest for the time of the delay. If complainant considered that it was entitled to interest, it could have protected itself by tendering the deeds, without waiving its claim to interest; but, when it made a demand for \$10,000, additional, before the surrender of its deeds, it made a demand for such substantial additional compensation as to require a new contract to warrant it.



Having reached this conclusion, it is not necessary to consider the question of complainant's laches, based on its quiescence, after the refusal of complainant to transfer the [67] property for \$134,000 and defendant's refusal to pay \$144,000, during which delay the defendant had acquired other rights and property, giving it the desired entry into Hoquiam.

The bill is dismissed.

(Filed Nov. 7, 1913.) [68]

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### **Final Decree.**

This cause having heretofore come on regularly for hearing upon the bill of complaint, the answers of defendants, reply, exhibits and evidence, and the Court having duly considered the same, and the arguments of the solicitors on behalf of complainant as well as those of the solicitors on behalf of the defendants, is of the opinion and finds that the complainant is not entitled to any relief herein;

It is therefore ORDERED, ADJUDGED and DECREED, and the Court does hereby ORDER, ADJUDGE and DECREE, that the bill of complaint of the complainant herein be, and the same is hereby dismissed, and that the defendants and each of them go hence without day, and recover of the complainant herein their costs and reasonable disbursements herein taxed at the sum of \$95.51 *Dollars*.

ORDERED, ADJUDGED and DECREED in open court this the 22 day of November, 1913.

EDWARD E. CUSHMAN,

Judge.

(Filed Nov. 22, 1913.) [69]

**Abstract of Testimony.**

BE IT REMEMBERED, that in the trial of this cause in the District Court before Honorable E. E. CUSHMAN, Presiding Judge, the complainant offered the following testimony:

**[Testimony of George H. Emerson, for  
Complainant.]**

GEORGE H. EMERSON (by deposition): Became acquainted with H. F. Baldwin, chief engineer of the Grays Harbor Railway Company, in September, 1908. Baldwin, with the Right of Way Agent and another person, came to my office in Hoquiam and submitted to me several different routes for their railway through property owned by the Northwestern Lumber Company, and asked me to make prices for the various rights of way submitted. I suggested an alternative arrangement, and submitted all the propositions in writing under date of September 25, 1908. This letter (Exhibit "A") was made a part of the evidence and is identical with the copy set forth in the complaint, to which reference is made.

"Q. Prior to the writing of that letter, Mr. Emerson, was there any discussion with Mr. Baldwin about the manner that the Railroad Company would cross the Hoquiam River at Simpson Avenue?

"A. Yes."

(The defendant objected to this question as incompetent and irrelevant.) [70]

"Q. Now, Mr. Emerson, what kind of a crossing do you refer to now with the City interested?

(Testimony of George H. Emerson.)

“A. A street crossing.”

Early in October, 1908, at the request of Mr. Baldwin, I went to Seattle. In connection with Mr. Baldwin and Mr. Farrell, Vice-president of the Oregon-Washington Company, I examined the Hoquiam Terminal plans of the Railroad Company. As a result of that visit on my return I wrote the following letter to H. F. Baldwin, under date of October 24, 1908:

“Propositions for the sale of property and release from damages from the Northwestern Lumber Company and Harbor Land Company include any release from damages for the crossing of tide land lots in front of Simpson Avenue on the East side of the Hoquiam River that these Companies may be interested in.

The proposition for right of way along Twelfth Street vacated as heretofore submitted includes the privilege of crossing to the South side of the Northern Pacific right of way and building adjacent thereto on Lot 3, Tract 15, Plat 9, Hoquiam Tide and Shore Lands, to Railroad Avenue.”

This letter was written to supply an omission in the original letter of September 25th, which omission was pointed out by Mr. Farrell.

Letter of June 9, 1909, set forth by copy in the complaint, was identified by the witness and introduced in evidence. The letter was signed at complainant's office in Hoquiam, Mr. Baldwin stated by the direction of Mr. Farrell.



(Testimony of George H. Emerson.)

Shortly after the signing of this paper, I delivered to Mr. Bridges, local attorney and I believe one of the trustees of the G. H. & P. S. Railroad Company, abstracts of title covering the land to be conveyed. Baldwin requested me to deliver the abstracts to Bridges. Afterwards Mr. Bridges said the titles were satisfactory. Prior to June 30, 1909, Bridges and Gordon, Right of Way Agent, met with me in my office at Hoquiam and we prepared a formal contract. This contract was sent to Mr. Jones, President of our Company. Mr. Jones made some changes and the draft of contract was again submitted [71] to the officers of the Railroad Company, Mr. Bridges and Mr. J. R. Holman, who had succeeded H. F. Baldwin, Baldwin having died about June 15th. On July 7, 1909, I mailed the following letter:

“We enclose herewith duplicate copies of the agreement this day reached at Hoquiam, Wash., by your Company, represented by your engineer Mr. J. R. Holman, and our Company represented by our President, Mr. C. H. Jones. These copies have been duly executed by the Northwestern Lumber Company and one of them please have executed by your Company and return to us, together with remittance stipulated, twenty thousand dollars (\$20,000).”

with duplicate agreement signed and acknowledged on that date by the officers of the Northwestern Lumber Company. This paper was introduced in evidence, and is identical with the agreement set

(Testimony of George H. Emerson.)

forth by copy in the complaint. This agreement was signed by Mr. Jones in behalf of the Company and was prepared in the presence of Bridges and Holman by their stenographer.

“Q. Did you at any time ever receive any notice from any officer of the Railway Company or from Mr. Holman or Mr. Bridges, in substance or effect, that this agreement was not satisfactory to the Railway Company?

A. Never.”

Prior to this meeting with Holman and Bridges, was added, at the request of Mr. Jones, to the eighth paragraph the following:

“It is further stipulated by the party of the first part that such bridge may be a joint-user bridge with the city of Hoquiam, provided the city of Hoquiam contributes its share to the cost of construction and maintenance.”

This sentence was incorporated in the agreement with the consent of Mr. Holman and Mr. Bridges.

“Q. Was there any conversation with them at that time as to whether or not any other kind of a bridge would be satisfactory to the Northwestern Lumber Company?

“A. I think it was, at all times, fully understood and so discussed between us that all we desired was a street crossing, and that there was no stipulation as to the kind of a bridge, other than that it was agreed to build a satisfactory bridge.

“Q. Was this understanding to be in the nature



(Testimony of George H. Emerson.)

of a consent that it might be a joint-user bridge, if a satisfactory bridge could not be agreed upon?

“A. Yes.” [72]

There were certain maps and franchises filed with the officers of the city of Hoquiam by the Railway Company. I saw the maps. I expressed to both Bridges and Holman the willingness of our company and its officers to assist the officers of the Railroad Company in getting franchises.

Witness identified Exhibit “G,” being letter signed by Bridges under date of September 15, 1909, which was introduced in evidence.

This letter is set forth by copy in the complaint. This letter was the result of a telephone conversation in which I told him that the signed agreement should be in our hands, to which he consented.

“Q. Does the last paragraph of his letter, then, express the substance of your verbal understanding over the telephone?

A. Yes.

“Q. That is to the effect that both parties recognized the validity of the agreement?”

(The defendant objected to this question because leading.)

“Q. What was the substance of your conversation over the telephone?

“A. The withdrawal of the agreement was simply that it should be in our hands instead of theirs, pending their preparation to comply.

“Q. Were you given any reason by Mr. Bridges or any other officer of the Railway Company for the



(Testimony of George H. Emerson.)

company's delay in signing the agreement which had been executed by your company?

"A. Never.

"Q. Have you been given any reason since?

"A. Never."

After July 7, 1909, in pursuance of the negotiation to sell this property, our company began the construction of a new store building instead of the store building we were occupying, and I built a house to take the place of the one I was occupying which was to be removed. Both the residence and store building were included in the property sold under the contract. We moved several [73] buildings which were on the property and refused to lease others, so that the buildings stood vacant from that day to this. We built the new store building on the back part of Block 51 in such a way that the spur from the proposed railroad would serve the building. The nature of the business required railroad trackage. The location of this new store building is not such as we would have chosen except that we expected the railroad to be built according to the plan. This store building was commenced about September 1, 1909.

"Q. After September 25th, 1909, what occurred between yourself and the officers of the railroad company, with reference to the terminal plans of the company, including your own interests at Hoquiam? What did you personally do with reference to these terminal plans of the railroad company?

(Testimony of George H. Emerson.)

“A. Negotiations were continued between the City Council and the railroad, with reference to reaching an agreement as to the bridge or bridges that were to be erected, and in that I was chairman of the committee for a while.

“Q. In that connection, what were your offers?

“A. To secure such an arrangement as would be satisfactory to all parties concerned.

“Q. Did you at any time during those negotiations relating to franchises, crossing of river, or any interests, or the vacation of streets, or any other public rights, oppose any plan authorized or adopted by the railway company?

A. No, sir.

“Q. A memorandum signed June 9th, 1909, contains this clause, ‘However, we shall expect and you shall give us your co-operation in procuring other properties in Hoquiam, and also franchises in Hoquiam.’ Have you had any request in pursuance to that request from the officers of the railroad?

“A. No. In conversation with Mr. Bridges, we told him we held those things in abeyance until the signing of his contract.

“Q. What things were held in abeyance?

“A. The procuring of right of ways and franchises.

“Q. Until the signing of what contract?

“A. The contract for right of way through the Northwest Lumber Company’s property.

“Q. Have you at any time been willing and ready to facilitate the railroad company in procuring prop-

(Testimony of George H. Emerson.)

erties at Hoquiam, and franchises at Hoquiam?

“A. Always.” [74]

On June 13, 1911, I tendered to Mr. Farrell four deeds, Exhibits “H,” “I,” “J,” and “K,” offered in evidence. These deeds correctly described the property as the same is described in the agreement under date of July 7th, signed by the Northwestern Lumber Company, and set forth in the complaint. Deed “K” of the Harbor Land Company, a controlling interest in which was owned by the Northwestern Lumber Company, covers the property described in my letter of October 24, 1908, supplementing the original proposition. I have never received any intimation that these deeds were not satisfactory in form.

“Q. Mr. Emerson, in fixing the price of the property, which you intended to sell at One Hundred and Thirty-four Thousand (134,000) Dollars—was any consideration given to benefits and damages as well as the question of value of the property to be conveyed?

A. Yes—very decidedly.

“Q. How was the final lump sum fixed—by negotiation or fixed by yourselves?

“A. It was fixed by ourselves.

“Q. Was there any segregation of damages, benefits or value of property?

A. No.

“Q. Would the building of the railroad, according to the plans of the company, as shown to you at Seattle, be a benefit to your company?



(Testimony of George H. Emerson.)

“A. It would have been a very great benefit.

“Q. Were there, or were there not any damages affecting your property?

“A. Yes—there were. It was injured somewhat at the mill, and it would necessitate the entering into of great expense in clearing the property of buildings, etc.

“Q. Not having the testimony of the defendants, and in order that this testimony may cover the whole case, I will state to you, Mr. Emerson, that the defendants, in their answer, in substance, state that a large part of the consideration named to be paid for this property, was in the nature of damages to your property over and above benefits. What have you to say in that connection?

“A. I should consider that the greater part of the consideration was an advantage to our other property. [75]

“Q. Why did you fix this price at One Hundred and Thirty-four Thousand (134,000) Dollars, and was it in consideration of damage to your other property in part or in whole?

“A. The consideration of benefit to our property in one place and damage to our property in other localities.

“Q. To what extent did the cost of damages of the property to be conveyed enter into it?

“A. I am unable to say.”

On cross-examination the witness testified as follows:

I do not think we would have accepted an offer for

(Testimony of George H. Emerson.)

that property for any purpose at any figure less than the figure at which we offered it to the railroad company. At the time of our original interview with Mr. Baldwin on the 23d or 24th of September, 1908, I think Mr. Gordon, the right of way man, and Mr. Bridges were there.

“Q. I understood you to say that at the time of that conference there was some discussion about bridges crossing the river. What was said in regard to that?

“A. We said to Mr. Baldwin that any negotiations of this kind must be subject to the approval of the city, in order to establish a highway bridge at that point—I mean a joint user bridge.”

“Q. Was it your understanding, and Mr. Baldwin’s understanding, at that time that that was a condition or stipulation in your negotiation?

“A. Mr. Baldwin stated there would be no trouble.

“Q. In the proposition you submitted two days later, was there any reference to the bridge?

“A. No.

“Q. Were there any other conditions under discussion between you and the railroad representatives other than those expressed in your letter and the letter of acceptance?

“A. There was some talk about the crossing from our store to our warehouse, which was satisfactory to them.

“Q. Was that to be put in the agreement?

“A. No, I think not.”

(Testimony of George H. Emerson.)

After this proposition was submitted in September, 1908, I went to Seattle in October, 1908, for a further conference, at which Mr. J. D. Farrell was present. I understood the proposition had to be submitted to him. After that nothing was done until June, 1909. [76]

“Q. Now, you stated that about the 7th of July, Mr. Bridges and some other parties came to your office, and a formal agreement, called for by your previous correspondence, was drawn at that time—who were present?

“A. Mr. Holman, Mr. Bridges and Mr. Jones, President of our company, and I think the right of way man, Mr. Gordon.

“Q. Was Mr. Jones present at the time Mr. Bridges dictated the draft of the agreement?

“A. I believe he was.

“Q. Did not Mr. Bridges dictate there in your presence the draft of the agreement which was submitted to you and left with you?

“A. I think there was an agreement drawn between us—dictated there to my stenographer by Mr. Bridges and written by the stenographer.

“Q. What became of that draft?

“A. It was sent to Mr. Jones and disapproved by him.

“Q. Why was it sent to Tacoma?

“A. He was not present at that meeting.

“Q. Was that on the 7th of July?

“A. No, it was not—we signed the agreement on 7th of July.



(Testimony of George H. Emerson.)

“Q. The agreement, which Mr. Bridges dictated in your office to your stenographer, and which Mr. Jones subsequently refused to sign was dictated in the presence of Mr. Holman and yourself and probably Mr. Gordon—was it not?

“A. I think it was.

“Q. And your company refused subsequently to execute that agreement?

“A. Mr. Jones insisted upon changing one clause. The clause which Mr. Jones insisted upon changing related to the building of a bridge in conjunction with the city of Hoquiam.

“Q. Was the agreement dictated on the the 7th of July signed?

“A. It was agreed to and was satisfactory to all parties present.

“Q. What became of the original draft dictated by Mr. Bridges?

“A. Mr. Bridges dictated both of these.

“Q. What became of the draft originally dictated by Mr. Bridges in the presence of yourself, Mr. Holman and Mr. Gordon?

“A. I do not know. It was written out and sent to Mr. Jones at Tacoma.

“Q. Now, Mr. Emerson, is it not a fact that this agreement, which [77] was signed was one prepared by Mr. Jones and not by Mr. Bridges?

“A. This agreement was prepared in our office in the presence of the parties mentioned, and was satisfactory to those parties.

“Q. Were there two meetings?

(Testimony of George H. Emerson.)

“A. It is my impression there were two meetings.

“Q. Were Mr. Holman, Mr. Bridges and Mr. Gordon present at all of them?

“A. I think so, either all of them, or a part of them—Mr. Bridges was there.

“Q. Is it not a fact that you were notified that the railroad would not accept the agreement with the bridge clause, and that is the reason they refused to sign?

“A. Never. They never notified us.

“Q. Did not Mr. Bridges notify you?

“A. No—never. The position of the company was such that they could have required of us a deed at any time in strict accordance with the proposition made and accepted by Mr. Baldwin.

“Q. This bridge clause was not in that proposition, but was added by Mr. Jones and was the only agreement he ever signed or tendered—is this not right?

“A. Yes. This was modified, however, to the extent that it was not binding on either party.

“Q. Is it not a fact that the only agreement Mr. Jones was ever willing to sign was the one containing the bridge clause?

“A. The only one he was willing to sign was the one he did sign, and it contained a bridge clause.

“Q. Who was Mr. Jones?

“A. Mr. Jones was President of the Northwest Lumber Company.

“Q. About the 25th of September, 1909, some four or six weeks after that agreement had been signed

(Testimony of George H. Emerson.)

by your company and delivered to Mr. Bridges—you requested Mr. Bridges to return it to your company. Did you not?

“A. Yes, it was agreed between Mr. Bridges and myself that we were to be the custodians of the agreement.

“Q. You knew at that time, then, that they refused to sign the contract in that form?

“A. They never notified me.

“Q. Did you ever inquire of Mr. Bridges or of Mr. Holman, or any representative of the railway company, why they did not sign it? [78]

“A. I do not think I ever did. If I did, it was an evasive reply.

“Q. Why do you say that if you did, it was an evasive reply, if you do not remember ever making the inquiry?

“A. In an understanding with myself, it seems to me the railroad were simply holding up until such time as they could arrange that bridge, and that was why they were not signing the contract. Negotiations began immediately for the arrangement of the bridge, that would be satisfactory to the city of Hoquiam and myself. These negotiations were with the city of Hoquiam.

“Q. Then you were mistaken in your previous answer when you stated that no reason was given for their refusal to sign that agreement?

“A. I guess I was mistaken.

“Q. You know that the refusal was account of the bridge clause therein? A. Yes.



(Testimony of George H. Emerson.)

“Q. That agreement was returned to you about the 25th of September, 1909, was it not?

“A. I think so.

“Q. From that time until June, 1911, when you tendered these deeds, what actions or negotiations were taken, or had by you, looking to the closing up of this alleged contract?

“A. I dropped out of this business about that time, and negotiations were continued between the city and the railroad until an agreement was finally reached and signed to the effect that each would build a separate bridge, that they would build their piers at the same time, and the other bridge when they saw fit. That was about the ninth of September, 1910.

“Q. You refer now to the final adjustment between the railroad company and the city on the question of the bridge crossing the Hoquiam?

“A. Yes.

“Q. In all these negotiations you had been assisting the city, had you not?

“A. No, I dropped entirely out of it, after the failure to have the original agreement signed. I was away most of the time. I was chairman of the citizens' committee in August, 1909. It was about that time that Mr. Jones was insisting upon the bridge clause in the agreement. The committee's position was that of trying to bring harmony between the two different parties and working in the interests of all concerned. [79]

“Q. Now, Mr. Emerson, after this bridge matter

(Testimony of George H. Emerson.)

was adjusted, which you say was in August, 1910, did your company then offer to execute the agreement between the railroad company eliminating the bridge clause? A. We at all times stood willing.

“Q. Please answer the question as I put it.

“A. I cannot tell you, as I was not present and do not know what action was taken.”

The negotiations were in charge of Mr. Jones from September, 1909.

The deeds tendered in June, 1911, expressed a consideration of \$134,000. I had no definite knowledge of any change of plans on the part of the railroad company until they came into Hoquiam with their railway trains about May 1, 1911. It was immediately after that we took up negotiations and insisted upon the carrying out of the contract.

“Q. At the time you tendered these deeds to the railroad company, did you not know that the railroad company had acquired rights over the N. P. track into Hoquiam, so that they would not need your property?

“A. We had no definite knowledge. Up to that time we never doubted the fulfilment of the contract.

“Q. Was that the reason you abated your demand for interest on the \$134,000?

“A. My answer to that question would be that we were willing to accept the original purchase price without interest, and so decided in our council.

“Q. When?

“A. At the time we made out the deeds.

(Testimony of George H. Emerson.)

“Q. You had heard that the railroad had acquired a right of way into Hoquiam in some other manner?

“A. After, we heard a rumor to that effect.

“Q. Prior to that time your company had refused to accept \$134,000 to convey the property, had it not?

“A. Not to my knowledge—Mr. Jones attended to that. I do not know that a counter offer was ever contemplated.

“Q. You stated in your direct examination that your company stood at all times to convey this property in accordance with the terms of the letter of September, 1908, and the acceptance in June, 1909. You do not mean to say that during all that [80] time your company stood ready to convey that property to the railway company for \$134,000, do you?

“A. I mean to say that if your company had come forward and given us a definite proposition to pay us that much, that in my judgment the board of trustees of the Northwest Lumber Company would have accepted.

“Q. Then the demand made by Mr. Jones for a higher sum was based simply upon a desire to get a little more out of the railroad if he could?

“A. Mr. Jones stated he was entitled to it, and I have no doubt such would be the opinion of the Court.”

We did not vacate the buildings on July 9, 1909, the very day the contract was signed. The lease ran for a short time and we refused to renew the lease. One was a hotel and one was a boarding-



(Testimony of George H. Emerson.)

house. These leases expired two or three months after July 9, 1909. We did not know at that time that the company would refuse to sign the agreement.

“Q. It was returned to you, unsigned, on your demand in September?

“A. The refusal to sign the agreement was simply in abeyance; that is to say, it was held up until satisfactory negotiations were arranged with the city. You were in a position to force us to a deed any moment you wanted to.

“Q. Did you not understand, Mr. Emerson, that they were not bound to purchase the property? That you had no binding obligation against them to purchase the property until they signed the agreement which your company signed and sent to the Railroad Company for its signature?

“A. They considered that we were bound by the Baldwin agreement, and that this was only carrying out the terms of the Baldwin agreement.”

We began construction of the store about September or October, 1909. I do not know whether the agreement had been returned to us at that time. I built a house in place of the house I was occupying, which is still on the property. The original store is still on the property.

On re-examination, witness testified:

After we sent the agreement of July 9, 1909, to the Railroad Company they never offered a substitute and never transmitted us an agreement in different form. They never offered to execute [81]

(Testimony of George H. Emerson.)

an agreement different from the one of July 7th, and never made any request upon us to execute an agreement which would eliminate the so-called "Bridge Clause."

On recross, he testified:

"Q. Mr. Emerson, you have before stated that Mr. Bridges, in the presence of Mr. Holman and Mr. Gordon, tendered an agreement substantially similar to the one which you executed under date of July 9th (7th), except that it did not contain the bridge clause.

"A. I think that is true, but I cannot tell you exactly.

"Q. You have also stated Mr. Holman told you subsequently that the reason the Railroad Company would not execute that agreement dated July 7, 1909, was because of their objection to the bridge clause. Is that not correct?

"A. That I think was held in abeyance awaiting adjustment with the city.

"Q. I understood you to say in answer to my previous interrogatories that it was the presence of the bridge clause which prevented the Railroad Company from signing it.      A. Yes.

"Q. Did you not understand that the agreement without the bridge clause, which was the same as the one drafted or dictated by Mr. Bridges, was the agreement which the Railway Company contended should be executed?      A. I think so.

"Q. The situation then was that through Mr. Bridges a contract was tendered on behalf of the

(Testimony of George H. Emerson.)

Railroad Company to your company, acting through Mr. Jones, and your company then tendered the contract of July 7th, containing the Bridge Clause, which the Railroad Company refused to sign, and the matter stood in that shape from July 7, 1909, until the tender of your deeds, in June, 1911?

“A. The Railroad Company held up their signature pending the negotiations with the city, was the statement made to me.” [82]

**[Testimony of C. H. Jones, for Complainant.]**

Complainant produced the testimony of C. H. JONES, taken by stipulation before an examiner.

I reside in Tacoma. I have been President of the complainant, Northwestern Lumber Company, since 1901, and own control of the stock. The proposition for right of way for the Grays Harbor and Puget Sound Railway Company came up in September, 1908. Mr. Baldwin discussed three propositions for right of way and easement through Hoquiam and our property. One proposition crossed the river south of the shingle mill on Railroad Street; another north of 8th Avenue; and another was going across at Simpson Avenue, with depot grounds on Block 50. We considered their propositions and talked over about opening the property across Simpson Avenue with Mr. Baldwin, and we suggested that he go across there and place the depot on Blocks 61 and 62. That was the Emerson Proposition designated in the letter to Mr. Baldwin under date of September 25, 1908. Our talk with Mr. Baldwin



(Testimony of C. H. Jones.)

preceded that letter, and at that time we had before us the maps of the city of Hoquiam.

“Q. At that time was there anything said about a bridge across the Hoquiam River on Simpson Avenue?

“A. Yes, sir, that was the first talk. That was the way that we suggested it to Mr. Baldwin, that there would have to be a bridge across there; that we had always contemplated a bridge there and the city needed it for its connections with East Hoquiam and the main part of the city. We always considered that, and it was part of the talk with Mr. Baldwin that the bridge would have to be across there, and talked about different kinds of bridges.

“Q. What was said on the subject?

“A. That there would no objection to that; that it could be arranged very easily. Some suggested a double deck bridge, but it was thought that would put every thing up in the air too high; and there were other kinds of bridges discussed. It was left in that way, for us to make our proposition to them, which Mr. Emerson and I did submit in this letter of September 25, 1908.”

The letter referred to is the letter identified by Mr. Emerson in his testimony.

The testimony relative to conversations with Mr. Baldwin relative to the bridge or other terms prior to the written agreement [83] objected to as incompetent, irrelevant and immaterial.

At the time of this talk with Mr. Baldwin, I was acquainted with Mr. J. B. Bridges, attorney for and

(Testimony of C. H. Jones.)

one of the trustees of the Railroad Company. We received a counter proposition from Mr. Bridges by letter, made Exhibit "D," which we rejected by letter made Exhibit "E." I had a personal interview with Mr. Baldwin on June 9, 1909, at our office in Hoquiam, at which there was present Mr. Baldwin, Mr. Bridges, and Mr. Gordon, their right of way man, and I think Mr. Isaacs, an engineer.

"Q. You may state what was said at that interview.

"A. That they were compelled to accept the proposition called the Emerson route; and there were a great many matters discussed at this time, and there was also the matter of the bridge question, which always entered into the whole matter and was one of the elements which was considered when we were making prices for the right of way and property what the railroad was to have. \* \* \* Mr. Baldwin was anxious to get a reduced price from our asking price of \$134,000, but finally he came around and asked me if we would take \$20,000 less. I told him we had given it a great deal of thought and considered all the advantages and disadvantages and so on; and that was as low a price as we could make. Well, he said, he would take it. He said he had a telegram from Mr. Farrell from San Francisco to close the deal for the right of way from the Northwestern Lumber Company on the best terms we can, 'if we have to give them their price,' or something to that effect. He tried to get a reduced price."

This Baldwin agreement was dictated to our sten-



(Testimony of C. H. Jones.)

ographer in our office and I signed the acceptance at the same time. Mr. Emerson attended to the matter of furnishing the abstract, "and conferred with Mr. Bridges, and I did not see the paper until after it was ready." I received a draft of a formal agreement at Tacoma, either from Mr. Bridges or Mr. Emerson, and wrote to Mr. Bridges about it, and notified him I would be in Hoquiam within a few days.

"A few days later I went to Hoquiam and went over the terms of the agreement and descriptions and everything, as I recollect. I went over to Mr. Bridges' office, or else it was there, and we read it over together there, Mr. Bridges and I, and I told him at that time that everything was all right with the exception that they had not any clause in there in regard to a bridge in connection with the city. He said, 'We can insert that in a few minutes,' and he went [84] off and wrote the clause which stated that the city might have a common user bridge by paying its proportion of the cost and expense."

That is the clause in the form of contract which I signed. He did not object.

"Q. Did you state to Mr. Bridges any reason why you wanted that clause in that agreement?

"A. It was,—we did not want to be on record in any other way. That was for the city and the railroad company as to what they should do. We wanted a bridge clause there, and we were only insisting that the city ought to have a right to say



(Testimony of C. H. Jones.)

whether it wanted one or not, or to go in there with them, and we thought that it would be no more than fair to have that clause in there. I did not want the city to think that we were against them.

“Q. As I understand, you mean to say that you told him you did not want to be in a position to interfere with the city insisting upon a bridge across there?

“A. We wanted it so it would be left to the city and the railroad company as to that, and we thought it was worded so that the railroad and city should agree upon it.

“Q. As I understand then, what you mean to say is that the substance of what you told him was that you did not want to be in a position to interfere with the negotiations one way or the other between the Railroad Company and the city?

“A. Yes, that is it. We wanted the city to act free and the railroad also.”

Mr. Holman was there at the time, or just previous to that anyway. The agreement was signed by me the day of this interview, July 8th or 9th, 1909. Since that time I have received no notice from the Railroad Company of any intention not to carry out the contract signed by me at that time. Our company has at all times been willing and ready to carry out that contract.

“Q. What in your opinion has your company lost by reason of this agreement having been entered into, and what you have done toward carrying out that, if finally the railroad does not build in accordance

(Testimony of C. H. Jones.)

with the plans as exhibited at the time this agreement was made?

“A. We have lost a whole lot of money; we have a lot of property there that would have been more valuable.”

We have been delayed in making necessary improvements and putting up buildings in connection with our sawmill operations, [85] both in extension of planing mill and lumber sheds, as we were anxious to have the tracks located first. We wanted to place our buildings at the most advantageous place. We would not have built any such class of store as we have if it was not expected to be on the main thoroughfare where people travel, and, in fact, we would not have built the store at all; we would have gotten along with the store we had at that time for a few years and saved all that money which was invested in that. If we were going to build a store with the railroad not there, we would not have erected it on that corner. Of course, there is some value to the building, but it is not of any value at all in comparison with what it would be on the main street where the travel is and where we have other property that we could just as well have built on. It was expected that there would be a sidetrack to serve this store. Once in Seattle I went with Mr. Holman over the grounds with him about the tracks and depot buildings, and he said that there would not be any trouble about getting a sidetrack in the rear of the store. I should say this was in September or August, 1910. He gave me no intimation at that

(Testimony of C. H. Jones.)

time nor at any other time that the contract was not to be carried out. Don't know whether we told him right out and out that we were building store and incurring other expenses, but he must have known it. I think about that time our foundations were all in there. The day the agreement was reached between the committee of the Commercial Club and City Council and the Railroad Company I had a telephone message to go to Seattle and meet Mr. Holman; that they expected to close the agreement. It was the same day the agreement was closed respecting the bridge.

“Q. State what occurred at that interview.

“A. I went to Mr. Holman's office, and he said he had just finished with the Hoquiam city committee, and the citizens' committee of the Commercial Club in regard to the bridge matter, and that they were each going to build a separate bridge. I told him I was glad they had settled on something, but that I thought it was a mistake that they did not have a common-user bridge. He went on to say, 'We can now fix up with you.' [86] I told him I was glad of that; that we had not changed our price or anything, but I thought we ought to have interest, and he said, 'You are the authority as to that,' or something of that kind. We talked about one thing and another, and I think we talked about the side-track to the store at the same time again, and he wanted to know how much interest and what it was on, and I told him I didn't know but I thought we should have interest on the amount; that they had



(Testimony of C. H. Jones.)

kept us out of it so long; that we wanted to give them all the time they needed; all that they needed to fix up the interest, and he said he could not do anything in regard to interest,—and would have to drop the matter. I said to think it over, and that was all that was said in regard to the interest or about settling up with the Northwestern Lumber Company. There was the agreement and they had to carry it out.

“Q. What interest did you ask him for?”

“A. I did not ask him for any interest; I said I thought we ought to have interest.

“Q. From what time?”

“A. I didn’t know whether he ought to pay us on the full amount or on the two cash payments. It was not anything that we would be hard about anyway.

“Q. In other words, there was no attempt at computation of the interest?”

Mr. BOGLE.—That is objected to as leading.

“Q. Now, then, have you been prepared at all times since the 20 days after the 9th of June, 1909, to carry out this agreement and deed to the railroad company the land according to the memorandum?”

“A. Yes, at all times.

“Q. Have you held the property subject to the terms of that agreement at all times?”

“A. It has been at all times ready to be turned over to them, or we would vacate at any time they notified us.

“Q. Have you been ready at all times to make conveyances according to the terms of your agreement?”

(Testimony of C. H. Jones.)

“A. Yes, sir.

“Q. I will ask you whether or not you gave me authority and employed me in this litigation to offer to deposit with the railway company such conveyances as would comply with that agreement if this deed tendered did not strictly comply?

“A. Yes, sir.

“Q. And have you been prepared at all times to carry that out?      A. Yes, sir.

“Q. And are you ready to do so now? [87]

“A. Yes, sir.

“Q. Have you the ability to do so now in so far as you have not disposed of any of the property?

“A. Yes, sir; we have not.”

On cross-examination the witness testified as follows:

The Baldwin agreement of June 9, 1909, was prepared and signed in the company's office at Hoquiam. My next interview with any officers of the Railroad Company was either at Mr. Bridge's office in Aberdeen or the Lumber Company's office in Hoquiam, after the original draft of the agreement had been sent to me at Tacoma. I was not present when this original draft was prepared. Mr. Emerson attended to that. I have no personal knowledge of what took place when the original draft was prepared. That original draft as sent to me at Tacoma by Mr. Emerson did not contain the Bridge Clause.

“Q. How did that Bridge Clause get in there?

“A. It came in there from Mr. Bridges. Mr. Bridges of Aberdeen had it when I went over the

(Testimony of C. H. Jones.)

final agreement with him.

“Q. How long after it had been sent by Mr. Emerson to you at Tacoma?

“A. I would think it was three or four days.

“Q. And this interview where the Bridge Clause was inserted in that agreement was held between you and Mr. Bridges in Aberdeen?

“A. Yes, sir, at his office.

“Q. Who was present?

“A. I do not know that anyone was present but Mr. Bridges and his son.

“Q. You insisted upon putting that clause in the agreement, didn't you?

“A. I only called the attention of Mr. Bridges to it, and he said, ‘Certainly.’

“Q. Isn't it a fact that you declined to sign the original draft which was sent to you by Mr. Emerson because it did not contain the Bridge Clause?

“A. No, sir, there were other things that we changed. [88]

“Q. What other things?

“A. I wrote to Mr. Bridges in regard to 9th Street. They wanted 9th Street closed and we could not allow that because that would shut off all traffic between our store and warehouses, and would almost cut off our business, and we arranged that clause so that it would read that the Railroad Company would have the right to lay tracks and so forth, but that they should not be allowed to have it blocked, and that the police should have authority there to see that it was not blocked, or something of that kind.



(Testimony of C. H. Jones.)

“Q. The absence of the Bridge Clause was one of the reasons you did not sign the original draft?

“A. No. It only came up here for my inspection as to the whole thing.

“Q. It came up for your signature, didn't it?

“A. No, sir, but so that when I came down there it could be signed up.

“Q. Was it your suggestion or your demand that that Bridge Clause was put in the agreement?

“A. My suggestion; that was all; no demand about it.

“Q. You wanted it in?

“A. All the talk was that it should be in.

“Q. And you wanted it in that agreement?

“A. I wanted that the city should have a chance to use their privilege, or have a chance to decide whether they wanted to go in on that common user bridge.

“Q. You wanted to bind the Railroad Company but leave the city to decide whether it would want it or not?

“A. No, I wanted to leave it so that they might have a common user bridge if it were desired. It would bind the city, not the railroad.

“Q. You could not bind the city? A. No.

“Q. If you could get the agreement signed it would bind the railroad; isn't that what you were seeking?

“A. No, sir, I was seeking to have them trade equally.

“Q. Couldn't they trade without your interven-

(Testimony of C. H. Jones.)

tion, or having the clause in your agreement about it?

“A. I don’t know whether they could.

“Q. Would your putting that clause in there enable the city and the railroad to trade on any more equal terms than if the clause was not in your agreement? [89]

“A. I don’t know but what we may as well have left that out.

“Q. It would have been much better to leave that out if you wanted the matter left entirely between the railroad and the city, wouldn’t it?

“A. It does look that way.

“Q. Now, isn’t it a fact that you insisted on that going in there so that the railroad would be compelled under that agreement with you to build a joint user bridge with the city?

“A. I didn’t insist that it should go in. I said that the talk had always been for a common-user bridge, and he knew it as well as I did, and it didn’t need any insisting, but was a suggestion. It had been left out.

“Q. Wasn’t the purpose you had in suggesting that it go in there to bind the railroad company to agree to a joint user bridge with the city?

“A. No. It was only so that the city and railroad could agree if they wanted to. If they didn’t agree, it would not amount to anything. I could not insist upon it.

“Q. If the railroad in its agreement with you, as one of the conditions of purchase of your property, agreed to construct or enter into an agreement with

(Testimony of C. H. Jones.)

the city for a joint user bridge, they could not buy your property without living up to the agreement, and wasn't that the object you had in putting it in there?

"A. I don't think so. I think it was so that the city could see that the Northwestern Lumber Company was going back,—(interrupted by counsel).

"Q. Was that agreement redrafted with that clause in there by Mr. Bridges in his office at Aberdeen the day you refer to? A. Yes, sir.

"Q. Was it signed by you on behalf of your company at that time?

"A. I don't know whether it was signed right there or taken back to our office. I think it was taken back to our office at Hoquiam; I couldn't tell. I know the Northwestern Lumber Company did their part."

I signed it on behalf of the Northwestern Lumber Company and Mr. Emerson send it to Seattle.

"Q. Isn't it a fact that Mr. Bridges told you that he did not think the Railroad Company would agree to that clause?

"A. No, sir, he did not say anything of that kind.

"Q. There was nobody present but you and Mr. Bridges? A. That is all. [90]

"Q. Did you leave a copy of the agreement as redrafted with Mr. Bridges?

"A. No, I think it was taken over by us and one sent direct to the Grays Harbor and Puget Sound Railroad Company.

"Q. But the typewriting and stenographic work



(Testimony of C. H. Jones.)

in the redrafting of this agreement was done in Mr. Bridge's office in Aberdeen?

"A. Yes, sir; that is all there was to it; just to add that clause that the city may, by paying its proportion of the cost and expense of operating, have a common user bridge.

"Q. Did you rewrite the whole agreement, or just add that clause at the bottom?

"A. Just added that clause.

"Q. You did not rewrite the agreement?

"A. No. We may have rewritten that one page.

"Q. Didn't you know from that time on that the reason that the Railroad Company would not sign the agreement was the presence of this Bridge Clause in it?

"A. I don't think that was it. I think they were trying all the time to arrange with the city.

"Q. But didn't you understand all the time that the reason they did not sign this agreement, which had been signed by you, was the presence of this Bridge Clause?

"A. There was never anything came to me from any of the officials of the Railroad Company."

It may have come to me, being my impression of something of that kind, but there was no notice.

"Q. But you knew as a matter of fact that was the reason the Railroad Company did not sign that agreement and return it to you, didn't you?

"A. No, because Mr. Bridges in his letter when the agreement was returned, did not want this to act in any way as against the Railroad Company to take

(Testimony of C. H. Jones.)

that property, and we always considered that the Railroad Company had that property and could compel us to make a deed at any time.

“Q. But you are wandering into argument.

(Question read.)

“A. I did not know what the reason was for a long time, and I don't know as I did then.

“Q. Did you ever inquire why they did not sign it? A. No, sir, I never inquired.

“Q. It ran then from July, 1909 up to the spring of 1911 after [91] you had signed the agreement and the railroad had refused to sign, and you never even inquired why they refused to sign; isn't that correct? A. That is correct; I never did.

“Q. And you do not know why they refused to sign? A. Only as I surmised.

“Q. What was your surmise, and what did you base it on? A. That they had not signed it.

“Q. But what was your surmise as to the reason?

“A. That was the excuse that they offered; they had no other excuse.

“Q. What was the excuse?

“A. They did not give me any.

“Q. But you say that was the excuse?

“A. Well that was the excuse I imagined they offered.

“Q. What is that?

“A. The clause in regard to the bridge being in that agreement.

“Q. Then you did understand or believe that the reason that the Railroad Company refused to sign

(Testimony of C. H. Jones.)

the agreement was because of this Bridge Clause in it. Isn't that correct?

"A. I hardly know how to answer that question. In a reasoning way to myself I reasoned it out that that was it, but there was no official of the Railroad Company or Mr. Bridges or any of them who ever said anything to me.

"Q. But you believed that was the reason?

"A. I must have believed it; it came to me.

"Q. But you did believe it?

"A. I don't know whether I did or not. I considered all the time that the Railroad Company did not want to give up their side of the agreement so but what they could claim that the Northwestern Lumber Company should execute their part of it; even stated so by Mr. Bridges; that it should be in our hands instead of theirs.

"Q. But notwithstanding all that delay, you are not willing to say you knew that they were refusing to sign because of the presence of the Bridge Clause?

"A. I say they never notified me or our company in any way of anything of the kind. We may have heard it in talk. Mr. Bridges or someone may have talked to somebody and we got it or some intimation, but there was never any notice to me or to our company that that was the reason they did not sign. I never asked what the reason was. [92]

"Q. Now, isn't it a fact that you didn't ask because you knew, or thought you knew, that they were refusing because of that Bridge Clause?

"A. No, I thought that they and the city would



(Testimony of C. H. Jones.)

agree to something and that it would come about in good time.

“Q. And that they would eliminate this clause?

“A. Yes.

“Q. Then you knew that was the reason they would not sign it?

“A. Well, I guess they thought we did.”

I held an interview with Mr. Holman in his office at Seattle in September, 1910, on the day that the Hoquiam Committee and the railroad agreed concerning the bridge. It was after the agreement had been reached between the city and the railroad.

“Q. Who was present?

“A. Nobody but Mr. Holman.

“Q. Wasn't Mr. Bridges present?

“A. No, sir.

“Q. Now, isn't it a fact that Mr. Holman in that interview, in the presence of Mr. Bridges, told you that they had adjusted the bridge matter with the city and that would eliminate any controversy between the company and his company, and he was ready to close the deal at \$134,000?

“I think Mr. Holman stated he was ready to close it.

“Q. And you told him that you would not carry it out for \$134,000; but that you had to have interest?

“A. No, I don't think I told him that. I told him I thought we ought to have interest.

“Q. And he said he would not pay interest?

“A. He said he could not do that; he did not say he would not.

(Testimony of C. H. Jones.)

“Q. You still insisted on interest?

“A. I told him to think it over.

“Q. Do I understand you say he would think it over?      A. No, I said that.

“Q. Isn't it a fact that Mr. Holman at that time told you he was ready to carry out that agreement at \$134,000 and pay the money, and when you insisted upon an additional amount by way of interest he stated he would not pay any additional sum and said he would declare the deal off? [93]

“A. He may have said that, but I didn't understand it that way. I thought we were talking about the interest, as to whether they would pay interest.

“Q. Didn't you understand when you left his office there at that time that he had declared the deal off because you had refused to carry it on at \$134,000?      A. No, I didn't.

“Q. And you don't remember that Mr. Bridges was present at that time?

“A. I don't remember that Mr. Bridges was present. It seems to me that Mr. Gordon was there.

“Q. Now after that interview neither you nor any other official of your company, so far as you know, ever called upon the Railroad Company to carry out that contract prior to the time the Railroad Company made its arrangements for operating over the Northern Pacific tracks into Hoquiam, did they?

“A. I think not. I don't think anything was done.

“Q. This interview was in September, 1910?

“A. Yes, sir.

(Testimony of C. H. Jones.)

“Q. The Railroad Company began operating into Hoquiam over the Northern Pacific along in September, 1911? A. Yes sir.”

No official of our company called upon the railroad company to carry out the original contract at any time after this interview with Holman in September, 1910, until Mr. Emerson tendered the deeds in June or July, 1911, after we heard they had arranged to operate over the N. P. tracks. Mr. Emerson, through Mr. Griffin, of Seattle, went to the Railroad Company in June or July, 1911. It was after we had information of the arrangement with the Northern Pacific. It came in a roundabout way. We took no steps in the matter until the deeds were tendered by Mr. Griffin when we learned of the arrangement with the Northern Pacific. No formal agreement was ever tendered after the signing of the agreement which I signed. The Railroad Company did not ask me to eliminate the Bridge Clause from the agreement which I signed. In my conversation with Mr. Holman in his office in 1910 when the matter of interest was talked about I did not [94] understand that he did not intend to carry out this agreement about purchasing the property at Hoquiam. I thought he was talking more in regard to interest, and that they would take that up again. The dispute was about interest. I did not in any manner agree to a termination of the contract. I had no conversation with Mr. Holman after the one in his office in September 1910. The talks with reference to a spur track had been prior to that time. [95]



**[Testimony of E. O. McGlaughlin, for Complainant.]**

Complainant further produced the testimony, taken on stipulation before special examiner, of E. O. McGLAUGHLIN.

I am manager of the Northwestern Lumber Company. I was a member of the Citizens' Committee to consider the application of the Railroad Company for a bridge on Simpson Avenue. There was an application for a franchise pending. The Committee was appointed, some by the Commercial Club and some by the City Council, soon after this application for a franchise was made by the Railroad Company. A month or two after that, after the committee was appointed, Mr. Emerson was away and the mayor appointed me to take his place as a member of the committee. This must have been some three or four months after the application for a franchise by the Railroad Company. I served upon the committee until the agreement was reached in September, 1910. There were eight or ten consultations with representatives of the Railroad Company. In all these conferences there was never a suggestion on the part of the officials of the Railroad Company of opposition to the highway bridge at Simpson Avenue. The Railroad Company, after the first two or three conferences, stated all the time that they had agreed to that arrangement and were satisfied with it.

“Q. What kind of an arrangement?

“A. An arrangement by which the city would grant the railroad a site for the crossing at Simpson

(Testimony of E. O. McGlaughlin.)

Avenue, to cross the river.

“Q. What was the form of expression used generally in connection with that proposed bridge?

“A. For a long time the only talk was a common-user bridge, but after the matter had been discussed a number of times it was suggested that perhaps it would be better for each to build its own bridge. I think that suggestion came from Mr. Adams first, as I remember it, he was fearful of the financial obligation the city would have to assume if they had to build this kind of a bridge.”

Mr. Adams was a member of the committee. The suggestion of two bridges, side by side, was finally worked out between the engineers of the city, Mr. Maughmer and Mr. Holman. This [96] was the suggestion finally agreed upon by the committee and everyone. During the earlier stages of the discussion the principal demand on the part of the railroad was the assurance on the part of the city that the city would finance their part of the bridge. That was in fact the only item or matter of argument or complaint on the part of the railroad company at first. And then the committee felt that they had sufficient assurance from the citizens that some arrangement would be made to finance the project, and the details were then gone into. At one meeting in the engineer's office at Hoquiam, Mr. Farrell was present. Mr. Farrell, Mr. Bridges and Mr. Holman represented the Railroad Company; Messrs. Adams, Maughmer and myself, the city. The discussion was much the same as at other



(Testimony of E. O. McGlaughlin.)

meetings, as to the financial ability of the city to carry their part, and as to the division of the cost. I remember saying to Mr. Farrell that I was surprised at the attitude of the railroad company in trying to put the city to the bad, or something of that kind, or to get advantage of the city, when they should be friendly and help work together. The reply was that the attitude of the Citizens' Committee was to put an unfair portion of the cost of the bridge on the Railroad Company, and the discussion was along those lines. We had begun at that time to talk about two separate bridges. I remember Mr. Farrell agreeing with me that the Railroad Company should give the city a full share of the street, and that the railroad should move up the river a little. At one of these meetings I recall a conversation with Mr. Holman about encroaching upon the Northwestern Company's burner. I spoke in the discussion there about the arrangement of these bridges and the division of space, and if the narrow bridge was allowed to come to the center of the street it would not leave sufficient room for the highway [97] bridge between the center of the street and the Northwestern Lumber Company's burner and slip, and that the Northwestern Lumber Company would object to an arrangement of that kind and Mr. Holman in my judgment showed a little temper in the matter. He resented the bringing in of the Northwestern Lumber Company's interest into the matter and gave me to understand that I was representing the city and not the Northwestern



(Testimony of E. O. McGlaughlin.)

Lumber Company in the negotiations.

“Q. What did he say?

“A. He said that they had their arrangements with the Northwestern Lumber Company and did not care to go into that discussion.”

The agreement between the Citizens' Committee and the railroad was reduced to writing and signed. Which agreement was thereupon produced, marked Exhibit “B” and introduced in evidence, and is as follows:

A contract between the Citizens' Committee, signed by McGlaughlin, Mourant and Maughmer, and Grays Harbor & Puget Sound Railway Company, signed by Holman, under date of September 9, 1910, the substance of which exhibit is that the Railway Company would build a lift bridge on one side of Simpson Avenue and that the city and Railway Company will join in building the piers of sufficient length to enable the city to build a lift bridge on the other side; the city to have the right to proceed with its construction of the bridge wherever it chooses, but to join in the construction of the piers.

“Q. Now, after the execution of this agreement between the city and Mr. Holman, do you know of anything further being done with reference to the pending franchises before the City Council?

“A. I think not. There was a map or plat of these proposed bridges prepared, and I saw it in Mr. Maughmer's office, but I am not at present of the opinion that we held any meetings about it after

(Testimony of E. O. McGlaughlin.)

the one at which the agreement was arrived at."

[98]

Through all these negotiations I was acting for the city and not at the request of the Northwestern Lumber Company. It was the general understanding at the Northwestern Lumber Company's office that we were to assist the railroad in any way we could. I don't remember of being particularly requested to assist in the passage of that ordinance or any ordinance. I never personally was so requested.

The witness here identified a map of that portion of the city of Hoquiam embracing the property of the Northwestern Lumber Company and the Simpson Avenue crossing, which was introduced in evidence to illustrate the situation, and is made a part of this record. The lands owned by the Northwestern Lumber Company are shaded. The black portion represents the proposed new street referred to in the correspondence, also Blocks 61 and 62, which were to be deeded to the Railroad Company. The red represents the land and properties to be used by the Railroad Company for right of way. The yellow represents the ends of streets which the Railroad Company wished to use.

About the time, or shortly before (See p. 68, Jones' tes.) this bridge agreement was entered into, I had a talk with Mr. Holman in the city of Hoquiam relating to sidetrack to the store building which we were about to build.

"I asked him, under the proposed arrangement

(Testimony of E. O. McGlaughlin.)

with the railroad, if we built the building as indicated, showing him the map, whether or not we could get our spur from his railroad to the back part of the store and warehouse, and he replied that we could very nicely. That was the substance of it."

I informed him at that time of the plans of our company relating to the store building. I marked out on the map and showed him where we were proposing to build and where we needed the track. The railroad had at that time at Hoquiam a local engineer, Mr. [99] Isaacs, who was about there off and on. While the store building was being built I saw Mr. Holman at various times on the trains, and in his office at Seattle and at Hoquiam and talked with him.

"Q Did anything occur which enabled you to say whether or not he knew that the Northwestern Lumber Company was proceeding to arrange its property in view of the contract?

"A. He certainly knew we were doing it.

"Q. State what leads you to believe that.

"A. The talk I had with him about the spur track, and the talks at various times. He was there at various times and saw the work.

"Q. What work was going on?

"A. The building of this store building of the Northwestern Lumber Company, and we were going to move off the land that was proposed to be conveyed to the Railroad Company. The store was building and we moved around the houses in the



(Testimony of E. O. McGlaughlin.)

next block to make room for the houses we would have to move off from this land.”

I am familiar with the accounts of the Northwestern Lumber Company.

“Q. What expenditures has the Northwestern Lumber Company incurred in view of carrying out the contract with the Railroad Company, if there existed such a contract?

“A. They spent a large amount of money. For the new store about \$38,000; for fixtures about \$7,000; for new wharf about \$4,000; for new warehouse on this wharf about \$4,500; for the moving of these buildings referred to, about \$2,700.

“Q. And in addition to what they actually expended, what has the company lost by reason of its efforts to carry out this contract, by way of damages or otherwise?

“A. By reason of the carrying out, or getting ready to carry out the contract, and the failure of the railroad company to carry out their part as expected, the loss has been considerable. This store building is now on a side street, whereas if the railroad had been built as planned, it would have been in the direct line of travel from the business portion of the town to the depots,—passenger and freight depots. If we had known that this railroad was not to be built, and it became necessary to build a new store, which it would probably at some time, we could have gone to another place, at the corner of 7th and I Streets, where we have a large lot in the center of the business part of town, and with trackage with

(Testimony of E. O. McGlaughlin.)

the present railroad, the Northern Pacific, and a place for dockage which would have been very much better for our business, and the location would justify the expenditure of the money we did expend in a wrong direction. I would say the damage on that account would be \$25,000. [100]

“Q. On account of building the store in a wrong location as a result of these improvements?

“A. Yes, in excess of the value that is now demanded.

“Q And what other expenditures?

“A. The expenditures on the adjoining block to prepare about moving these houses; I would say about two thousand dollars damages; and the loss of rents, because we could not rent our property located on the land that the Railroad Company was expected to use that would amount to about twelve hundred dollars. And the delay and damage to the lumber business because we were unable to formulate or carry out our plans on account of the delay in locating, and the arrangements by the railroad company, would amount to probably ten thousand dollars. We were held up there for more than two years and could not make any improvements or conveniences for our business. The wharf was built back of the store because under the present arrangements with the store in the wrong place, the distance to the store was so great that we had to build more wharf room.”

I figure the total at about forty-three thousand dollars.



(Testimony of E. O. McGlaughlin.)

“Q. When was the first knowledge that you had that the Railroad Company did not intend to carry out this agreement according to its terms?

“A. The first notice I had was reading in a newspaper that an arrangement had been made between the Railroad Company and the Northern Pacific by which they would use the Northern Pacific tracks and bridge at Hoquiam.”

That was in the summer of 1911, two or three months before they actually began to use the tracks. I think they actually began on the 23d of September. I first knew about it a couple of months before that. No notice was ever given to me or to the company, so far as I know, that the Railroad Company did not intend to go ahead with their plan as shown on the maps filed with the city. If such a notice had been served or given, it would have come to me, sure; either to the Northwestern Lumber Company or to the Citizens' Committee, because I was chairman of that committee. I had charge of the mill of the Northwestern Lumber Company. I was the only representative at Hoquiam at that time and the only man who was constantly there in charge of the business. I had no knowledge of what took place between Mr. Holman and Mr. Jones in Seattle. [101] I heard nothing about it.

(On Cross-examination.) Mr. Jones was President of our company. I had no knowledge of any controversy. I had nothing to do with the negotiations of the Lumber Company with the Railroad Com-



(Testimony of E. O. McGlaughlin.)

pany. I substituted Mr. Emerson as a member of the Citizens' Committee. That was primarily for the purpose of bringing about some agreement for a joint user bridge by the Railroad Company and the city. The city council had asked the assistance of the citizens in negotiation this franchise and crossing in order that the city might save the crossing for the city at Simpson Avenue.

“Q. What you had in mind at that crossing was to bring about a joint user bridge?

“A. That was the first proposition, yes.”

I don't know that the bridge item alone was what brought the committee into existence. I think the Mayor and city council thought that it was a matter of much importance to the city and wanted the citizens to share in the negotiations and take some responsibility. I don't know anything about the insertion of the Bridge Clause in the agreement. Those agreements were made between Mr. Emerson, Mr. Jones and the railroad officials without my knowledge.

“Q. Didn't you know at that time that your company was insisting that the railroad should agree to a joint user bridge with the city across the river?

“A. No, they favored it, but I don't think they were insisting upon it. Not to my knowledge.

“Q. And you, as a member of this committee, favored it?     A. Yes, sure.

“Q. You didn't understand that the Railroad Company wanted a joint use, did you?

“A. A joint user bridge,—the Railroad Company

(Testimony of E. O. McGlaughlin.)

first agreed to a joint user bridge.

“Q. But what I ask you is whether the railroad as an initial proposition preferred or wanted a joint user bridge? Isn't it a fact that the Railroad Company preferred to have its own bridge?

“A. I think likely that is true.

“Q. A joint user bridge was a suggestion coming from your committee or the citizens? [102]

“A. The committee was appointed by the council with the understanding that under no circumstances must the city be permitted or allowed to lose their crossing; they must preserve it to the city, and would not grant any franchise under any other plan. The Committee was given to understand that by the city council and the mayor when they were appointed.

“Q. How long was it after that agreement (referring to the bridge agreement of September 9, 1910) was entered into before your company commenced to construct this store you speak of?

“A. Well, they had just about had it started then—the actual work. We had been preparing plans and we started along in August or September, 1910. I cannot recall the exact time when the actual work was begun.”

The other work was going along about the same time. The dock was constructed later. The piles of the dock were driven in the spring of 1911—the winter and spring. The dock building was completed along about September, 1911. The work on the dock was prosecuted continuously but with a



(Testimony of E. O. McGlaughlin.)

small crew. More than \$2,000 was expended unnecessarily in removing buildings. We really wasted a couple of thousand dollars we ought not to have spent, as the buildings bring little more rent. The \$700 was the enhanced value.

“Q. You speak of a loss of twenty-five thousand dollars on account of the wrong location of your store. Can you itemize that loss?

“A. No, that is only an estimate and would be my judgment. It is simply placing quite a large investment in a place where it is at a disadvantage. It is not in the right location.”

The business is about as good as it was before. The store is a substantial building and cost about \$37,000, and is larger than the old store building, and a better building.

“Q. How do you figure out that you have lost twenty-five thousand dollars if your business is as good now as before?

“A. We have invested our money in the wrong place. If we were to build a big store building in a desert somewhere, it would all be lost.”

With the increased investment we should have a bigger business. The ten thousand dollar item I spoke of was “delays and inability to carry on to advantage the lumber business.” We could not build sheds because they were to locate new tracks, and could not handle our [103] business to advantage on account of the bad conditions. The business is constantly growing and changing and we have to meet these things.



(Testimony of E. O. McGlaughlin.)

“Q. Your plant arrangements and plans were all as good as before these negotiations?

“A. Excepting that they were getting worn out and run down somewhat.

“Q. You mean you lost \$10,000 during those two years because you did not make changes that you would have made?

“A. Yes, we could have run to better advantage if we had been able to prepare ourselves and fix our plant as it should be.”

After our information that the railroad was operating over the Northern Pacific we put in an addition to the building we had on Third Avenue. After the bridge agreement was made we built out to the line where the bridge would come. That is our planing-mill. Since then we have had to put up big lumber chutes and fix the tracks. We went at it as soon as we knew about it. Mr. Holman resented what he considered my interest in the Northwestern Lumber Company, when we were considering the bridge agreement at one of the meetings in Seattle; either the meeting at which the two bridges were agreed upon, or shortly before that; one or two meetings before that, either in September, 1910, or a little before that. “Mr. Holman objected to my lugging in the Northwestern Lumber Company’s affairs; that they had been already settled and he did not want any more trouble about it.” He seemed to resent my assuming to represent both the Northwestern Lumber Company and the city at the same time. That is the way I looked at it.

(Testimony of E. O. McGlaughlin.)

“Q. It is a fact, isn’t it, that as a member of the committee you took the side of the city in the matter of the joint user bridge?

“A. Well, I felt that the city should have the crossing, but I was very anxious to complete this arrangement so that the Lumber Company’s affairs would be settled and we could go ahead and carry out our plans.

“Q. But the point I asked about is this; isn’t it a fact that in those negotiations you took the side of the city on the questions that were under negotiation between the city and the Railroad Company? [104]

“A. Yes, I was to represent the city in my position on the committee.

“Q. And where there was a question between them as to the plan or expense, you were urging the city’s end of the contention?

“A. My argument was favorable to the city.

“Q. And you were urging the city’s part of it in the matter of a joint user bridge?

“A. Well, we did not hang on to the joint user bridge after the engineer suggested two bridges; the city members of the committee decided that perhaps the city could put in their piers first, and would not be required to raise all the money necessary to complete the bridge; only enough to put in the ends.

“Q. But you urged and insisted upon a joint user bridge from the beginning of the negotiations until you found that the city’s proportion would be a pretty expensive proposition, and then it was that you agreed to the separate bridges?



(Testimony of E. O. McGlaughlin.)

“A. No, that is not true. I thought a joint user bridge would be the best for both concerns, and used my efforts and arguments to that end, both with the railroad and the city, and I still believe that would have been a very nice solution.

“Q. But you did agree subsequently to separate bridges?

“A. I did because that seemed to be the consensus of opinion,—that we could settle up the matter and come to an agreement on that line.”

Before we really arrived at any agreement on the division of expense, the change to two bridges had been suggested or talked of or argued for by some member of the committee, so that really the other negotiations were never carried to an issue.

On re-examination the witness testified that no structures have been put on this property which was to be conveyed to the railroad company. The lumber company has at all times been in a position to turn the property over to the railroad company since June, 1909. Had it not been for this contract with the railroad company, the money spent in the store building would have been invested to very much greater advantage and would have been much more valuable. We put in a lot of money on the side street which should be put on the main street. The property would [105] be worth twenty-five thousand dollars more to-day if it had been located without reference to these railroad plans. That is what we have lost by reason of the contract through the building of the store.



(Testimony of E. O. McGlaughlin.)

Recross-examination.

“Q. The railroad did not control you in any way in locating your new store?

“A. The railroad did not have anything to do with the location except this contract to be carried out. The railroad had everything to do with that.

“Q. You expected the railroad would build that line, and therefore you located your store with respect to the main travel? A. Yes, sir.

“Q. But the railroad did not suggest where to build the store?

“A. Except by their plans,—what they proposed to do.

“Q. You could have built it on this other lot you spoke of if you had wanted to?

“A. Oh, there was nothing to prevent it, or anything done to hinder us.” [106]

**[Testimony of P. J. Mourant, for Plaintiff.]**

Complainant further introduced the testimony of Mr. P. J. MOURANT, taken by stipulation before the special examiner.

I was mayor of Hoquiam from May, 1910, to July, 1911. I was a member of the committee appointed by the Commercial Club to consult with a committee of the council in regard to certain franchises applied for by the railroad and in relation to the city giving the railroad a right to place a bridge across the river. I became a member of this committee in the fall of 1909. An ordinance was filed with the council, but I do not know the date. The committee was appointed within about thirty days

(Testimony of P. J. Mourant.)

after that. After I was mayor we held several meetings with the railroad representatives. I was on the council prior to becoming a member of the committee, but not after going on the committee. It was generally understood, prior to my becoming a member of this committee, by the people, the citizens of the town, that the city would have to build a bridge at Simpson Avenue. In fact, the council, I would judge about three or four years before, instructed the engineer to make application to the War Department for a permit to put a bridge in there. The first meeting I can recollect was held in the city council chamber in the early part of the summer of 1910, at which were present, representing the railroad, Mr. Bridges, Mr. Holman, and Mr. Isaacs. Isaacs was the resident engineer. The discussion at that time was the cost of a joint user bridge. The railroad company submitted plans of two separate styles of bridges; one was a lift-bridge, similar to the one we are building here in Tacoma; the other was, I think, a rolling lift-bridge. They submitted terms, costs, and about the proportion the city should bear at that time. The discussion at that time between the railroad company officials and the committee was as to the city's portion of the cost for that common user bridge, and it seemed to be the opinion of the committee that the railroad company was placing the city's share of [107] the cost at too high a figure.

“Q. Was there any request on the part of the railroad officials in that negotiation with the com-



(Testimony of P. J. Mourant.)

mittee, or a suggestion of an exclusive railroad bridge built in such a way that the city could not use it; that is, a bridge at Simpson Avenue?

“A. No, sir, not as I understood, although at that meeting I believe that I personally suggested that probably the railroad company had placed the city’s share of the cost at such a figure to discourage the city from joining in the building of the bridge, but they claimed they did not, and claimed they had employed engineers to get up the plans, and instructed them to figure out the city’s and the railroad company’s portion, and that it was not their figures, but the engineers’ figures, who were designing the bridges.

“Q. Was there anything said at all by the railroad officials which suggested any intention or desire to avoid building a common user bridge?

“A. No, they denied at all times in our meetings that they were opposed to the city getting a crossing there. I would not say that they were not opposed to the common user bridge, because they suggested that the city build a bridge across there also, alongside of them, that is, a separate bridge.”

That meeting was held at the council chamber at Hoquiam. Afterwards we met at Seattle, at which there were present Mr. McGlaughlin, Mr. Maugher, city engineer, Mr. Wright, chairman of the street committee, and myself. Representing the company there was Mr. Holman and other O. & W. officials. I believe Mr. Murray, their resident bridge engineer at Seattle, was there. At that



(Testimony of P. J. Mourant.)

meeting an agreement was arrived at which was reduced to writing and signed.

“Q. During that discussion at Seattle was there anything said by Mr. Holman about the particular location of this bridge with reference to the burner of the Northwestern Lumber Company?

“A. Not by Mr. Holman, as I understand. In that agreement they were to build a bridge on the north side of the center of the street, and allow the city of Hoquiam to put in their substructure or piers on the south side, and at that time they wanted to claim the right of way to the center of the street. As I understand, Mr. McGlaughlin of that committee, suggested that on account of the city bridge being wider than the railroad bridge, it would crowd the bridge against the Northwestern Company's burner and interfere some with their log slip, and Mr. Holman stated that he [108] did not think that they were dealing with the Northwestern Lumber Company; that they had settled with them, and it was a case of making a deal with the city.

“Q. Now, after this agreement was signed by the committee, what more was done between the railway officials and the city with reference to either the bridge or the pending franchise?

“A. None that I know of.

“Q. From the time, then, that this bridge agreement was executed, September 9, 1910, did the railway officials request the city officials in any way to act upon the pending franchise?

“A. Not to my knowledge.

(Testimony of P. J. Mourant.)

“Q. When was the first knowledge that you as mayor of Hoquiam had that the railway company did not propose to use the franchise or did not propose to further request the franchise which was pending in the City Council?

“A. Well, I think it was when I saw it in some of our local papers that they had reached an agreement with the Northern Pacific to use the Northern Pacific bridge and come in on their track on the east side.”

And on cross-examination the witness testified:

“Q. What was the occasion for the appointment of this citizens' committee?

“A. The Grays Harbor & Puget Sound Railway Company asked for a franchise from the city to use certain streets and ends of streets in extending a line from above 9th Street, in Hoquiam, northerly, following along the river and waterfront through the town, and the citizens of Hoquiam had been figuring for several years on having to put a bridge across at Simpson Avenue, which is the only practicable point south of our present bridge, and we had some time before made an application to the War Department for a crossing, but it seems that the railway company got in ahead of us. So their petition for a franchise was referred to the committee of the council, the streets, wharves and bridge committee, I believe. I think that the mayor at that time requested the Commercial Club to appoint a committee of business men to meet with the committee from the council to see if it was possible to



(Testimony of P. J. Mourant.)

make arrangements for a joint user bridge to be put in at that time across Simpson Avenue bridge before they would grant the franchise. I think that was the reason the committee was appointed.

“Q. And this committee in the various negotiations and conferences did urge a joint user bridge across the river?

“A. Yes, in the first place, we wanted a joint user bridge.

“Q. The railroad company did not want a joint user bridge?

“A. No, I would not say that. The railroad company never refused to put in a joint user bridge, although some members, I personally, thought probably, from the price they seemed to want to charge the city for the city's share of the bridge, that probably they were trying to discourage it, but they denied that. [109]

“Q. They did not refuse outright to join in a joint user bridge, but you got the impression that they were really opposed to it, did you?

“A. Yes, that seemed to be my impression at one time, yes.

“Q. As a matter of fact, you never did agree on a joint user bridge?

“A. We decided in the agreement to build two separate bridges.”

The committee was composed of George H. Emerson, W. Adams, H. C. Heermans and myself. Shortly after, Mr. Emerson took a trip to Europe, and Mr. McGlaughlin took his place. Mr. Emerson



(Testimony of P. J. Mourant.)

was chairman of the committee. He was also vice-president of Northwestern Lumber Company. Mr. McGlaughlin was manager of that company. The remark of Holman against the interests of the lumber company being brought into the discussion, was, as I understood it, to the effect that they had or could deal with that company separately, and that he did not want to mix up the Northwestern Lumber Company's negotiations with the city.

On redirect examination, the witness testified:

I did not get the impression that the railroad company was opposed to a joint user bridge from anything they said. They denied that they were opposed to a joint user bridge, that is, they denied that they were trying to block the city from getting a crossing over the river.

On recross-examination:

“Q. In that franchise which they were asking from the city they did not embody the feature of a joint user bridge, did they?”

“A. Their franchise, as I understand, was presented before I was a member of the city administration, and it was just asking for a franchise to use portions of certain streets to extend their line through the town.

“Q. The suggestion of a joint user bridge was made by either the city or this committee to which you have referred, acting in the interest of the city?”

“A. Yes, sir.” [110]

The defendants introduced the following testimony by depositions:

**[Deposition of J. B. Bridges, for Defendants.]**

J. B. BRIDGES: I am a practicing attorney, with offices at Aberdeen, Chehalis County, Washington. In 1908 I was a local attorney in the Grays Harbor country for the Grays Harbor & Puget Sound Railroad Company, a subsidiary of the Oregon and Washington Railroad Company, of which J. D. Farrell was the General Manager and Vice-President and in control of the business.

I was connected to a considerable extent with the negotiations for the purchase of right of way and property at Hoquiam from the Northwestern Lumber Company. In these negotiations Mr. Baldwin participated largely prior to his death, and after that Mr. Holman, who succeeded Mr. Baldwin as chief engineer. Preliminary to this negotiation, Mr. Farrell and Mr. Baldwin were having some trouble in securing an entrance into Hoquiam. They finally settled down to crossing the river south of the Northern Pacific, or at the Simpson Avenue crossing, an extension of Simpson Avenue. The Northwestern Company owned considerable property which would be affected by either one of these crossings. At the early stages of the negotiation between the Lumber Company and railroad officials, I was present off and on, but did not have much to do with the matter, the lumber company submitted propositions in writing, among which was what is known as the Emerson Proposition, dated September 25, 1908. The railroad looked most favorably upon this Emerson Proposition, but was



(Deposition of J. B. Bridges.)

dissatisfied with the price, one hundred and thirty-four thousand dollars. I was asked to see if I could get the price reduced, and was authorized to offer eighty thousand dollars. [111] This was *some* in October, 1908. I told Mr. Emerson that I was authorized to offer eighty thousand in lieu of one hundred and thirty-four thousand dollars. Mr. Emerson said that his company was somewhat split up over the offer that had been made, and if it were to be made over again they felt that they would raise the price rather than lower it; that there was no use to make a counter-proposition as to the amount. I told him I did not think the railroad would purchase the property at that price, but that I would report to them the conference. The matter was taken up again in June, 1909, through Mr. Baldwin, and resulted in the document signed June 9, 1909, which is set forth in the complaint and marked Exhibit "D" of the Emerson deposition. About 27th or 28th of June Mr. Baldwin came to Aberdeen "with a view of putting the letter agreement into the form of a contract, if possible." I think Mr. Gordon, right of way agent, was present. Mr. Emerson was there. I do not think Mr. Jones was present. Mr. Emerson and myself were trying to lick the matter into shape of a contract. Mr. Emerson's stenographer was called in, and I, with Mr. Emerson's assistance, dictated the proposed contract, which Mr. Emerson was to have written out and give me a copy which I might send to the officials of the road for approval or disapproval. A



(Deposition of J. B. Bridges.)

day or two later Mr. Emerson sent me a copy of the contract, writing a letter in connection calling my attention to changes in several particulars. I went over the contract with Mr. Isaacs, local engineer, and sent the paper to Mr. Gordon, right of way agent at Seattle. The paper of June 9th contained substantially the entire agreement as far as I had any knowledge. The copy which came from Mr. Emerson to me did contain the bridge clause. That was the first I knew [112] of the common user bridge proposition. Mr. Emerson called me by phone just about the time he sent this copy and said Mr. Jones desired further changes in the contract. (Mr. Bridges here offered letter under date of June 30, 1909, from George H. Emerson, which is Exhibit 1 of the deposition of J. B. Bridges, and is as follows:)

“I made some changes in our contract. By reference to Mr. Baldwin’s requisition and our answer, I find easement required across our mill-pond was for double-track road, which I think was thirty ft., therefore, have made that correction.

The right of way across our mill-pond should be an easement, as we could not have a fill there and could not afford to place ourselves in position where we would not be able to handle our logs freely. I have, therefore, made that change in the contract.

We have always expected the pier to stand about thirty feet from the line of our mill-pond piles, thus allowing a vessel to lay immediately above or immediately below the pier without encroaching upon

(Deposition of J. B. Bridges.)

the width of the draw span. Such a position of the pier would also best suit the depth of the channel and strength of the current. I have, therefore, stipulated that the Western pier should be as nearly thirty feet from the present line of our boom as practicable.

I think the city has made application for the privilege of erecting a bridge at this extension of Simpson Ave., and it has always been agreed to by Mr. Baldwin that the city could join with them in the construction of a joint user bridge. I have, therefore, introduced that clause in this agreement. I think a joint user bridge would be as desirable to the railroad as to the city. It would afford direct communication to the passenger depot, freight depot, and all parts of Hoquiam lying east of the river and would facilitate traffic from the station.

By reference to the original agreement with Mr. Baldwin, I find the width of the street we propose to dedicate was stipulated at fifty feet instead of sixty. I have, therefore, introduced a paragraph allowing the railroad people to designate the width of the street as to whether it shall be fifty or sixty feet. My judgment is that a sixty-foot street would be a better proposition.

We are anxious to build our mercantile establishment on the southwest corner of Block 51, one of the considerations being this joint user bridge at Simpson Avenue, and the other our warehouses and wharves, which would otherwise have to be abandoned. I wish you would ask your engineer



(Deposition of J. B. Bridges.)

this question—"Can the platform be so depressed that we can truck across to our warehouses?" I do not know where your depot would stand, but I suppose it would be in Block 61. In that case the privilege of trucking across adjacent to the alley, or on the south side of the Lamb property would enable us to build on Block 51. Your engineer can, perhaps, answer that question, and upon the answer depends very largely the point where we must build our store. It is therefore, very important that we should know immediately, as time is short in which to [113] build and move.

I have sent a copy of this contract to Mr. Jones, who will return it to you with his comments. Please have it executed by your people and returned to us for execution at as early a date as you can. Each day, while the days are long and the weather is good, is very important to us in doing the large amount of work that is before us." [114]

The contract was later re-drawn by the Northwestern people, and was finally drawn and signed by them as set forth in the pleadings. This contract contains two or three important provisions which were not in the contract as dictated by me with Mr. Emerson's assistance. One was the common user bridge clause; the other was the cash payment of twenty thousand dollars, and some other features with reference to the width of certain streets and some matters of no very great importance. Paragraph B as set forth in the draft signed by Mr. Jones under date of July 8th and con-



(Deposition of J. B. Bridges.)

tained in the complaint was not in the original draft dictated by me. That paragraph was put in the contract by the Northwestern people after my dictation of the original draft with Mr. Emerson. Mr. Jones telephoned me at Olympia that Mr. Emerson had sent the proposed contract to the Grays Harbor and Puget Sound Company at Seattle. These contracts, signed by the Northwestern people, were returned to me by Mr. Holman, who had succeeded Mr. Baldwin, Mr. Baldwin having died a few days prior. By reference to a letter, I find it was July 21st that these contracts were returned. On July 23, 1909, I wrote the Northwestern people a letter, which I now produce and which was introduced in evidence, being Defendant's Exhibit 3, as follows:  
[115]

**Defendant's Exhibit 3.**

"Answering your letter written by Mr. Emerson and dated July 16th, with reference to contract with the Grays Harbor and Puget Sound Railway Company, I beg to advise that I had a talk with your Mr. Jones on Tuesday of this week concerning the contract, and beg to confirm the same as follows:

In the contract and at the end thereof is the following clause:—

'It is also further stipulated by the first party that such bridge may be a joint user bridge with the city of Hoquiam provided the city of Hoquiam contributes its share of cost of construction and maintenance.'

Mr. Farrell, the General Manager of the railroad

(Deposition of J. B. Bridges.)

company, desires that this clause be stricken from the contract before it is signed by the railroad company. His position is, that we are negotiating with the city of Hoquiam concerning the bridge rights, and he thinks that the matter of a common user bridge should be one to be left to adjustment altogether by the railroad company and the city. I so expressed myself to your Mr. Jones, but at the *same* he seemed to be of the opinion that the clause should remain in the contract.

We shall continue our negotiations with the city concerning this matter and find out what disposition it has concerning the bridge, and will later advise with you about it; meanwhile, we would like for you to consent to the clause quoted be stricken out, and if you will not so consent, then we ask that the matter may stand as it is until we can come to some definite arrangements with the city concerning the matter.” [116]

About the same time I went to Hoquiam to confer with the officials of the Lumber Company, trying to get them to relieve the proposed contract of the bridge clause. I had a conference with Mr. Jones (I don't think Mr. Emerson was there), in which I told him the railroad people would not sign the contract with the common user bridge clause in it; that Mr. Farrell refused to approve it in that way, and asked him to cut it out of the contract.

“I explained to him that the railroad company had to go before the City Council in order to get a franchise from the city, and that such a clause in



(Deposition of J. B. Bridges.)

the contract, it seemed to me, was unnecessary for the protection of the city; that the city was in a position to protect itself, and that such a clause would hamper us in getting our franchise. He said he must insist on that clause remaining in the contract, and refused to allow it to be stricken out. Again, a few days after that I saw Mr. Jones and had a talk with him about the same matter. Practically the same conversation was had in an attempt to get him to relieve the contract of this clause. I told him at one or both of these conversations that I understood the city was not in a position to pay its just proportion of a common user bridge, and if were agreeable to the city not to have a common user bridge, would he then cut it out. He said he did not understand that the city would take any such position. The matter was fully discussed between us, with the result that the railroad company would not sign it with the clause in there, and Mr. Jones would not permit the clause to be cut out. The contract, meanwhile, had been returned, as I have stated, by Mr. Holman, and was in my safe, which Mr. Jones knew. Inasmuch as the railroad company would not sign with the bridge clause in it, and the lumber company would not agree that it should go out, and it being understood between Mr. Jones and myself that the railroad company would try to make some satisfactory arrangement with the city concerning a bridge at this place, it was agreed between us orally that the matter should stand just as it was for the time being, to see if



(Deposition of J. B. Bridges.)

the objectionable clause could not be eliminated by agreement with the city, or to see if we could not come to such an arrangement with the city as Mr. Jones would be willing to eliminate the bridge clause.”

The witness’ attention being called to his letter of September 15, 1909, set forth in the complaint, he was asked:

“Q. Explain the circumstances under which it was written.

“A. The circumstances are these: As I stated before, the papers signed by the Northwestern Lumber Company had some considerable time before that come to me and were in my safe and I had these conferences with Mr. Jones, [117] and on the day that the letter was written, or possibly the day preceding, Mr. Emerson called me up on the phone from Hoquiam, saying that he was sending or going to send a messenger boy to my office for the purpose of getting and for the purpose of the return of these contracts to the Northwestern Lumber Company. I think the same day the messenger came, and as I now recall it, he left a letter from Mr. Emerson to me which letter is as follows:

(Here Defendant’s Exhibit 4 was introduced in evidence.)

**[Defendant’s Exhibit 4.]**

“Please deliver to the bearer the deed and any other papers that may be in your hands belonging to the Northwestern Lumber Company and con-

(Deposition of J. B. Bridges.)

nected with the right of way transaction, pending between the Northwestern Lumber Company and the G. H. & P. S. Ry.” [118]

The witness continued:

“The messenger being there for the papers, and I did not have time, without refusing to give them to him, to confer with the railroad officials at Seattle, I felt, inasmuch as the railroad company had not signed the papers, that I was not justified in refusing to turn them over to the messenger. At the same time, I was not certain that I knew all of the arrangements between the parties, and out of the usual precaution I wrote this letter, saying that I returned the papers, reserving such right as the railroad company might have.”

No reply was received to this letter. After that there was considerable negotiation with what was known as the Citizens' Committee.

“As I stated before, the temporary understanding between Mr. Jones and myself was that we were going to try to come to same arrangement with the city. The committee of citizens was appointed, I think by the mayor, to confer with the railroad company in this matter. At the early stages of this bridge matter, Mr. Baldwin and I had gone to the mayor, who was at that time Dr. Frery, and talked with him about the bridge in a general way, and Mr. Baldwin had suggested that if the bridge should be built there that he thought that the railroad company would be willing to put on the bridge sidewalks, and the mayor thought that that would prob-



(Deposition of J. B. Bridges.)

ably be satisfactory, and expressing himself that the city was not in a financial condition to build a bridge, and that that would relieve the situation somewhat. Mr. Baldwin and I, on the same day, talked to one or two councilmen, and practically the same kind of talk; but it soon developed that the people of Hoquiam would not be satisfied with sidewalks on a railroad bridge, and this committee was appointed for the purpose of talking the matter over with the railroad company. Several conferences were had in Hoquiam, at most of which I was probably present. Mr. Holman was present at some of them. Mr. Farrell, Vice-President and General Manager, was present at one. \* \* \* The first idea of the committee was that they wanted a double-decked bridge, but that was soon abandoned as being impractical and unsatisfactory, and the next idea was a common user bridge. A bridge with two decks, one for the railroad and one for the general traffic, being side by side. Mr. Holman at one of the meetings presented figures as to what it would cost—what the city's just proportion of the cost of such a bridge would be, and the citizens' committee appeared to be much surprised at the expense, feeling that Mr. Holman's figures were not accurate. \* \* \* It was finally concluded that the city could not stand the expense of its proportion of a common user bridge, and it was suggested by some person that there was room there for two bridges at the Simpson Avenue crossing, and that the railroad company could take one side of the



(Deposition of J. B. Bridges.)

street with its own bridge, build it independent, it being a bridge in the nature of a lift-bridge, and when the city got ready it could build one alongside of a similar kind.”

I came into the final conference at Seattle, on September 9, 1910, a little late. An agreement [119] had been reduced to writing. Mr. Holman showed it to me. That is the agreement already in evidence. Mr. Emerson was appointed chairman of this bridge committee, but before we had gotten very far he went away, to Europe, and Mr. McGlaughlin, manager of the Northwestern Lumber Company, was substituted on the committee, whether as chairman or not I do not know. Between September 15, 1909, and this agreement of September 9, 1910, there were no negotiations between the lumber company and the railroad. “The whole thing was in abeyance, as I have heretofore stated.” On September 9, 1910, when the agreement was made with the citizens’ committee, I was at Mr. Holman’s office at his request. Everybody had left when Mr. Jones came in.

“Q. State in detail what occurred at that time.

“A. There were present Mr. Jones and Mr. Holman and myself. Mr. Holman stated to Mr. Jones that an agreement had been made with the citizens’ committee with reference to the bridge at Simpson Avenue crossing, whereby the railroad was to put a bridge on part of the street that would be in the nature of a lift-bridge, and the city, whenever they chose to, should have the remainder of the street.

(Deposition of J. B. Bridges.)

Mr. Jones said that he understood that such was the condition. \* \* \* Mr. Holman then stated to Mr. Jones that the railroad company was ready now, this bridge matter having been settled, to close the deal for the purchase of the right of way from the Northwestern Lumber Company, which, he said, he remembered that the consideration was to be \$134,000. Mr. Jones answered and said, 'Yes, that was the amount, but,' he said, 'it will cost you more money now; it will cost you \$10,000 more, or \$144,000.' Mr. Holman said to Mr. Jones, 'I do not know why it should be any more than it was, why you should make it \$144,000.' Mr. Jones answered by saying that this price had been put on about a year before, and that now the price was \$144,000. At that stage of the conversation I said to Mr. Jones that it did not look reasonable or fair that he should increase the price of it, although the price of \$134,000 had been fixed something like a year before, there had been many things standing in the way of consummation, and that his company had been in possession and occupancy of the land all the time, and the railroad company had had no use of it whatsoever. He said that that did not make any difference; that the price now was \$144,000. It appeared that my talk to him rather put him out of [120] humor, or at any rate, he left that impression with me—he was somewhat flushed. Mr. Holman then said, 'Now, Mr. Jones, we are ready to take up this deed for \$134,000 and pay you for it, but we will not pay you any more.' Mr. Jones says, 'You cannot



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have it for any less than \$144,000,' and walked out of the office. That was the end of it. Mr. Jones demanded there at the conversation a payment of ten thousand dollars extra, or \$144,000, before the transfer would be made, and Mr. Holman expressly refused to pay it."

There were no further negotiations. That was the last of the negotiations. I know that the Grays Harbor and Puget Sound Railroad Company conveyed all its property to the Oregon and Washington Company. By reference to the deeds of record, it appears that the Grays Harbor Company conveyed to the Oregon and Washington on June 27, 1910, and on December 23, 1910, the Oregon and Washington conveyed to the Oregon-Washington Railroad & Navigation Company. Subsequently to this conversation, in September, 1910, the Oregon-Washington Railroad & Navigation Company acquired a right of way into Hoquiam over the Northern Pacific tracks. In 1906 the Grays Harbor Company had procured a franchise on a line parallel with the Northern Pacific. That franchise contained certain limitations. Some time after September, 1910, in the spring of 1911, the Oregon-Washington Railroad and Navigation Company entered into a contractual agreement with the Northern Pacific Railroad Company, whereby the former would cross over into the city of Hoquiam over the Northern Pacific, over the Hoquiam River bridge, and using its tracks in the city of Hoquiam, and there was to be a double-track arrangement between the city of Aberdeen and the



(Deposition of J. B. Bridges.)

city of Hoquiam. I do not remember the date of commencement of operations. The fact of such an arrangement was made public in Aberdeen and Hoquiam during the spring of 1911, soon after the contract was made; I think in May, 1911, I went before the council and announced the completion of the arrangements made with the Northern Pacific with reference to getting [121] into Hoquiam and the use of the bridge of the Northern Pacific, and all these arrangements were made public. I recollect that it was along about May, 1911. As far as my knowledge goes, there was no talk with the Northwestern people after September, 1910, concerning this right of way until August 5, 1911, when Mr. Emerson and Mr. Griffiths, who was representing the lumber company as their attorney in that matter, came to my office and asked me if I was secretary or some official of the Grays Harbor and Puget Sound Railroad Company, and I told them that I was secretary formerly, and they then made demand with reference to the taking over of this property and at that time rendered a deed. This was some three months after the announcement had been made of the arrangement with the Northern Pacific. They had and presented deeds executed by the Northwestern Lumber Company; two or three different deeds; one was a quitclaim deed and one a warranty. It was a formal tender of performance on their part. They demanded \$134,000. Mr. Griffiths, in the presence of Mr. Emerson, stated that they now made demand that the railroad com-

(Deposition of J. B. Bridges.)

pany now take up the deed on payment of \$134,000, and they waived any interest claim, and waived anything that might have been in the contract with reference to the bridge clause, and said they made their demand upon the purported contract which had been executed by the Northwestern Lumber Company and which the railroad company refused to execute, and the original offer in the Emerson proposition and the acceptance thereof by Mr. Baldwin. I refused the tender. This suit was brought soon afterwards.

Shortly after this talk in Mr. Holman's office, on September 9, 1910, the Northwestern commenced to make some improvements [122] which they had in contemplation. They commenced after that conference; I would not wish to state just when. According to my recollection, they had not made any improvements before that.

On cross-examination the witness testified:

I was one of the trustees from some time prior to September, 1908, until after these negotiations. I am inclined to think I was Vice-President, but would not want to be sure about that. I was Secretary. I think I was one of the trustees all the time. I think Mr. West and Mr. Patterson were the other two. Mr. Baldwin was chief engineer until the time he died. He was succeeded by Mr. Holman. Mr. Farrell was never directly an officer of the company. The interest of the Washington and Oregon was by virtue of the ownership of its stock. Mr. Farrell was no officer, although he had control of



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the officers of the Grays Harbor and Puget Sound Railroad Company. I did very little toward the purchase of property. I was attorney and did not act in any capacity other than attorney except when there were some papers to sign, or something of that character. Mr. Farrell had ultimate charge. The first personal, absolute knowledge I had of Mr. Farrell's connection was when he refused to accept the proposed contract with the bridge clause in it. I anticipate he knew all about it before that date. He made objection to that clause. I would not want to say that the balance of the contract was agreeable to him, although I don't know that it was not agreeable to him. He made no objection to me except the bridge clause. The only changes I recollect now in the contract signed by the Northwestern Lumber Company was that all of paragraph 8 was [123] added, and a provision for the payment of twenty thousand dollars down. That is all I recollect now. Relating to the payment of the money, there was no objection; whether it was agreeable or not, I do not know. The bridge clause was the only paragraph I ever objected to. The twenty thousand dollar payment was never discussed in my presence. That was not in the contract originally and was not in the contract when I drew it. I do not know that it had ever been talked of after that as to whether it was satisfactory or not. As far as I know, the bridge clause was the only objection to the agreement.

Mr. Holman at this point stated that Mr. Baldwin



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died on June 16, 1908. By consent this became part of the testimony.

I think the description came from the right of way office of the railroad company; I cannot say positively. I am satisfied that the description was correct and was so acceded to by both parties. They were difficult descriptions and we did the best we could to make them right. The draft signed by the lumber company is very much the same as the one dictated by me in the presence of Mr. Emerson, with the exception of the bridge clause and the twenty thousand dollar cash payment, and some minor details, which I think would cut no figure. The twenty thousand dollar payment was not objected to. That is all I can say about that. I do not recollect being present at the conference on June 9, 1909, when the proposition of September 25th was talked over—I think I was not present at the conference but was present when the acceptance letter was written. I do not know what was said at that conference, if such conference was held. Prior to [124] the writing of this letter from Mr. Emerson of June 30, 1909, which is Exhibit “III” to my testimony, I had never heard any discussion with the officials of the Northwestern Lumber Company about a bridge across the river being so constructed as to accommodate the public travel as well as the Railroad Company, but there had been some little talk with some of the city officials, which I think was before that. Prior to that time I had filed application for a franchise with the city. In connection

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with that there was some discussion with the city about a bridge. I think there were three drafts of the formal agreement; the first was the one I dictated. The next was the one that Mr. Emerson got out and sent to me with his letter of June 30, 1909, being the one I had dictated, with certain modifications and changes. The second one, I feel very certain, made no provision for the payment of anything down. Then from conversations I think there must have been the third draft. The bridge clause was put in the second one. It was put in by Mr. Emerson—the letter transmitting it indicates that. I think there was nothing about the time of payment in the second draft. My recollection is refreshed by a letter from Mr. Jones mentioning the twenty thousand dollars, which was the first I had known of the twenty thousand dollar matter. The first draft was prepared near the very last of June, as I refreshed my memory from letters. To the best of my recollection there were only three drafts of the agreement. No contract was drawn, or attempted to be drawn, until after Mr. Baldwin's death, or before the latter part of June, when I drew the contract in Mr. Emerson's office. With the exception of paragraphs 8 and 9, the contract as signed by the Lumber Company is substantially as I dictated it, except the twenty thousand dollars clause. My impression is that there was the first draft, which I dictated; then the one which Mr. Emerson sent [125] me, containing the bridge clause; and later the one which was signed, which contains, in addition to the bridge



(Deposition of J. B. Bridges.)

clause, the twenty thousand dollar cash provision.

“Q. And it was agreed between you and Mr. Jones that that controversy as to whether that bridge clause should remain in the agreement or not, was left in abeyance to see what the City Council and Mr. Holman would do?

“A. Well, in a general way. There was no time fixed or anything of that character, and it was just simply an understanding between us that maybe the Railroad Company and the city would get together in such a way that Mr. Jones would think it unnecessary to have the bridge clause in the contract, and it was so left as it was.

“Q. In other words, that controversy as to whether the bridge clause should be in or out was left in abeyance for the time being?

“A. Yes, sir, in that way.

“Q. In other words, it might not become important at all?

“A. Yes, sir. It might not become important.

“Q. And is not that why in your letter of September 15th, in which you transmitted these agreements to Emerson, you stated the understanding between you was that it should not affect the agreement of the parties?

“A. No. The reason I put that in there was the one I gave before,—that here was a large deal; the papers were in my possession; Mr. Emerson had sent a messenger for the papers, and that I felt, so far as my knowledge went, that I had no right to withhold the papers longer, but at the same time I had



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some hesitancy about surrendering the papers because I was not certain that I knew all of the arrangements between the parties. But I felt certain enough about it to surrender the papers, and it was for that reason that I put that clause in there. I remember very distinctly the reason.

“Q. You say in that letter: ‘By returning to you it is not the intention of the Railroad Company to waive any rights which it has with reference to the agreement to purchase this property, and I anticipate it is not your intention that the handing of these papers to you should have that effect.’ Now, was not that statement made by you in writing in pursuance of the understanding with Mr. Jones?

“A. Yes, the latter part of it. I think so.

“Q. The letter was intended to be a stipulation between you that the return of the papers should not affect the status of the deal either way? [126]

“A. No. Up to that time the parties had failed to get together on a contract. They had entered into a tentative agreement or arrangement by means of the letter written by Mr. Baldwin, but when it came to getting into the details there were a great many of them, a great many changes; a great many things were put into the written agreement which were not at all mentioned in the letter, and the parties were unable to get together. And I did not consider—I never considered that there was any writing whereby they were bound by any such terms as these.

“Q. I understand you to say that the only point upon which they did not get together and which was

(Deposition of J. B. Bridges.)

not satisfactory so far as you knew, was this clause about the bridge?     A. Yes, sir.

“Q. So that you had reached an agreement on everything else, hadn’t you?

“A. So far as I know, we had.

“Q. Now, is it not a fact, Mr. Bridges, that at the time you wrote this letter of September 15, 1909, returning this draft of an agreement, everything had been agreed upon except the bridge clause?

“A. As far as I know, it had been.

“Q. And is it not a fact that by agreement between you and Mr. Jones, that bridge clause was to remain in abeyance until the city of Hoquiam had considered the question in the course of your negotiations with the city?

“A. This agreement or understanding—I do not know whether it would reach the dignity of an agreement—but that was the understanding between Jones and myself.

“Q. And whether or not there was an original understanding between Baldwin and Emerson and Jones about this bridge, you do not know?

“A. No, I do not know of any.”

In connection with the conversation in Mr. Holman’s office in September, 1910, “did not, in that connection, Mr. Jones say that he was entitled to interest?”

“A. He did not demand interest. He demanded ten thousand dollars, he said.

“Q. Did not he say he was entitled to interest?

“A. No, he said the amount now necessary was



(Deposition of J. B. Bridges.)

\$144,000, or ten thousand dollars more than the original amount.

“Q. Are you certain, Mr. Bridges, that he stated the exact amount? [127]      A. Yes, sir.

“Q. Did not he say that was interest?

“A. I am inclined to think that he said in answer to Mr. Holman’s question as to what that ten thousand dollars was for, that it was interest.

“Q. Interest on the amount of the contract?

“A. He may have said that. I would not be positive about that. \* \* \* I am inclined to think he said that was interest.”

Mr. Holman said that he would not pay anything more than \$134,000.

“Q. Now, is it not your recollection that the substance of what Mr. Jones requested or demanded was interest?

“A. I think Mr. Jones said interest, in answer to Mr. Holman’s question as to what the ten thousand dollars was for; that the contract or the price had been fixed nearly a year before and that he thought they were entitled to—I would not be willing to say one way or the other whether the ten thousand dollars was interest. He said expressly he would demand ten thousand dollars more and take \$144,000 to close the deal; but I cannot say positively one way or the other as to whether he said it was interest.”

Mr. Griffiths said, when he tendered the deeds, that he would waive any claim above \$134,000. I understood Mr. Griffiths and Emerson were there to formally tender the deeds; that that was their purpose



(Deposition of J. B. Bridges.)

in coming there and not their idea or hope of settlement. A little before July 7th, 1909, I caused a proposed franchise to be introduced at Hoquiam, with a view to crossing the river at Simpson Avenue. There was practically nothing done but the introduction of the franchise. It never came up again, because it was understood between the counsel and myself that the question of the bridge would have to be discussed and some arrangements come to about that, and the counsel has never to this day had the franchise up again that I know of. The agreement provides that the Railroad Company and committee should co-operate to put the franchise through. [128] This matter with Mr. Jones came up very shortly, or on the same day, and of course after that the Railroad Company, so far as I know, took no steps whatever to cross at the Simpson Avenue Crossing, either with the city or otherwise. I did not notify the Railroad Company that it was not the intention to sign a contract for the purchase of this property.

Referring to the September 9th conference:

“Q. Holman did not notify them, then, that there was no intention to carry out the contract?

“A. Holman said he would not pay anything more than \$134,000.

“Q. But he did not say he would not carry out the contract?

“A. Not in these words. \* \* \* The talk there was, Holman, representing the Railroad Company, was willing to \$134,000 for their deeds. They were

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not willing to deliver the deeds for that price.”

It was agreed upon the record that the deeds from the Grays Harbor and Puget Sound Railroad Company to the Oregon and Washington Railroad Company and the deeds from the Oregon and Washington Railroad Company to the Oregon-Washington Railroad & Navigation Company might be introduced by copy. The material part of these deeds is as follows:

Complainant's Exhibit “A”—the record of a deed from the Grays Harbor & Puget Sound Railway Company to Oregon and Washington Railroad Company, under date of June 27, 1910, which deed, after specific description of property conveyed, contains the following:

“Also all and singular the right of way and other rights of every kind and character heretofore acquired or hereafter to be acquired in any manner whatsoever by the said Washington corporation in aid of any connection with the aforesaid railroad route, and any and all other railroad routes or rights of way of the Washington corporation in the State of Washington now or hereafter surveyed or located or hereafter to be acquired \* \* \* . Subject, however, to any and all existing liens, and charges upon the said [129] premises hereby conveyed, or any part thereof, all of which the Oregon corporation (the grantee) hereby assumes and agrees to pay.”

Complainant's Exhibit “C”—the record of a deed from the Oregon and Washington Railway Company



(Deposition of J. B. Bridges.)

to the Oregon-Washington Railroad & Navigation Company, dated December 23, 1910. Part of the description is as follows:

“All the railroad and telegraph lines of the vendor, together with all the rights, powers, immunities, privileges, franchises and all other property appertaining thereto, subject to the rights of the Chicago, Milwaukee & Puget Sound Railway Company relating to joint ownership \* \* \* . All appropriation of real estate and other property made by the vendor, and all suits, actions or rights of action instituted by the vendor for the condemnation of property for use in connection with any railroad of the vendor, or any branch or extension thereof. To have and to hold the above railroad, telegraph lines, franchises, rights, contracts and other property unto the vendee (Oregon-Washington Railroad & Navigation Company) and its successors and assigns. The vendee hereby assumes and agrees to keep and perform each and every of the contracts hereby assigned and transferred or intended to be assigned and transferred by the vendor to the vendee, and the vendor agrees to pay and discharge all the debts and liabilities so that the property hereby conveyed shall be free from all debts and liabilities of the vendor.” [130]

I received the abstracts. I found nothing serious the matter with the abstracts. While there were some little technical matters, there would have been no difficulty. There was no objection to the title. My understanding is that the Oregon and Washing-



(Deposition of J. B. Bridges.)

ton Company financed the Grays Harbor and Puget Sound Railroad Company; that all the money was furnished by the Oregon and Washington and came from J. D. Farrell, who is Vice-president. All I know about the twenty thousand dollar payment on signing the contract was that it was inserted by the Lumber Company. It was never taken up by me with any of the officers of the Railroad Company, or by Mr. Farrell or Mr. Baldwin or Mr. Holman, or any of them. The word "stipulated" as contained in the 8th paragraph was not used by me in any part of the draft which I dictated. I do not think I ever used the phrase, "That it is stipulated." At the time I agreed with Mr. Jones that the matter should stand in abeyance until we could see what arrangement could be worked out with the city, the Railroad Company had absolutely refused to agree to the bridge clause. It had refused to sign the agreement with the bridge clause in it. Mr. Jones refused to withdraw that clause. It was agreed that the matter should stand to determine whether the Lumber Company would waive that clause or not. "That is my understanding; that inasmuch as Mr. Jones, representing the Lumber Company, would not withdraw the clause, that possibly negotiations with the city would be of such a nature as would persuade him to withdraw the clause." I never had any reply to my letter of September 15, 1909, either written or oral. The officers and trustees of the Puget Sound Company never acted upon this contract. Their action with regard to this property was perfunctory. They [131] had nothing to do with the

(Deposition of J. B. Bridges.)

actual business of the company. There was no person had any authority to act except under Mr. Farrell, none of the officers of the company. Their duties were perfunctory.

On re-examination the witness testified that Mr. Farrell was Vice-president of the Oregon-Washington Railroad & Navigation Company and had entire charge of the transaction. He knew about this contract as early as July, 1909.

**[Testimony of J. R. Holman, for Defendant.]**

The defendant introduced the testimony of J. R. HOLMAN, taken by stipulation before a special examiner.

I am Assistant General Manager and Chief Engineer of the Oregon-Washington Railroad & Navigation Company. I became engineer of the Grays Harbor & Puget Sound Railroad Company July 1, 1909, by appointment of Mr. Farrell, who was Vice-president and General Manager, succeeding H. F. Baldwin, who died June 16, 1909. Some time in July, 1909, the Grays Harbor & Puget Sound Railroad Company conveyed its property to the Oregon and Washington Railroad Company, which subsequently, in December, 1910, conveyed to the Oregon-Washington Railroad & Navigation Company. Since the dates of their respective conveyances, neither the Grays Harbor and Puget Sound nor the Oregon and Washington have engaged in any business whatsoever. My first connection with the Northwestern Lumber Company negotiation was about July 6, 1909. At the request of Mr. Gordon,



(Testimony of J. R. Holman.)

right of way agent, I went to Hoquiam July 6th with Mr. Gordan to confer with the Northwestern Lumber Company officers relating to the details of an agreement which it was proposed to formulate with these people relative to right of way. I knew nothing [132] whatever of the previous negotiations. When I took hold of the business on July 1st I found matters in a chaotic state, and had had no opportunity to advise myself relating to this transaction. At Hoquiam I had an interview with Mr. Jones—Mr. Gordon was present—in the office of the Northwestern Lumber Company in Hoquiam.

“Q. Tell what took place at that interview.

“A. The question I was called upon to decide or adjust had reference to the crossing of our tracks on 9th Street, I believe it was. That had previously been agreed to as one of the streets which was to be vacated. The Northwestern Lumber Company had subsequently decided that that crossing would have to be left open, and they wanted some adequate provision in the contract that left the street open. We went to view the premises on the ground. Mr. Jones pointed out how it was necessary and important to them that the street be left in order to enable them to reach their warehouse, and after considerable discussion of the subject we formulated an agreement in reference to leaving the street open, and how it was to be vacated and left under the control of the Railroad Company although for public use.”

I think at that time there was a carbon copy of a



(Testimony of J. R. Holman.)

draft, which I do not remember of reading or having in my possession. I do not know whether this draft contained the bridge clause, as I do not remember having read it. I am positive the bridge clause was not mentioned.

“Q. Why are you so positive on that point?

“A. In the first place, if it had been, I would have investigated the facts in regard to it, because I fully appreciate the impossibility of such a clause; and from the second fact that in returning the executed agreement to Mr. Bridges some two weeks later I called his attention to the fact that this bridge clause had not been discussed at our conference with Mr. Jones.”

When I received the agreement signed by the Lumber Company dated July 7th, 1909, and went over it in detail I found this bridge clause in there. I had never before that assented to this bridge clause, and had had no conversation with any representative of the Lumber Company in which it was mentioned. My next conference [133] with Mr. Emerson, September 3, 1909, in Seattle. This was a conference with the so-called Hoquiam committee, appointed by the city council and Chamber of Commerce of Hoquiam, of which Mr. Emerson was chairman. The meeting was in my office. The mayor, city engineer and several other gentlemen were present. After the meeting Mr. Emerson remained and we discussed the matter of the bridge. I pointed out to Mr. Emerson the fact that we were anxious to avoid the common-user bridge for va-

(Testimony of J. R. Holman.)

rious reasons, the most important of which was we were afraid that the city could not finance its proportion of the bridge and would therefore delay us in getting into the city. Mr. Emerson assured me that that would not stand in the way; that the Northwestern Lumber Company itself would see to the financing of the bridge on the part of the city. On September 20th, 1909, Mr. Emerson came into my office in Seattle and we further discussed the bridge question as to what progress was being made, and, incidentally, the agreement. I told him this bridge clause was standing in the way of the execution of the agreement, and I suggested that the best way to overcome that difficulty was to continue the negotiations with the city and see if we could work out some plan in regard to the bridge which would avoid the necessity of any such clause in the agreement. He told me that he was going to leave for a trip to Egypt and that the matter could remain in abeyance. At this conference I told Mr. Emerson that the bridge clause was the objection to the contract. I believe from the conversation he fully understood that that was the objection to the contract. I cannot recollect the specific words. On December 30, 1909, I had a talk with Mr. Jones in my office. He wanted to know what was the matter with the [134] Northwestern agreement—what was holding it up. I told Mr. Jones that Mr. Farrell had refused to sign the agreement on account of the insertion by him of the common user bridge clause. We thought that worked an injustice on us in dealing



(Testimony of J. R. Holman.)

with the city for our franchise, and while we were perfectly willing to negotiate with the city and deal with the city, we did not want to be hampered by an obligation of this kind in a real estate transfer, and that Mr. Farrell was immovable in his attitude and would not sign with that provision in it, but if it were eliminated, the agreement could be signed and we could consummate our trade with the Northwestern Company. Mr. Jones replied that if that was our stand in the matter, he supposed we might as well consider the deal off.

My next conference with members of the Northwestern Company was on September 9, 1910, with Mr. Jones. Mr. Bridges, our attorney, was present, at my office in the Central Building in Seattle. This conference was after the agreement with the city committee had been reduced to writing and signed. Mr. Jones came over on request by telephone. "I remarked that we had now reached an agreement with the bridge committee with reference to the bridge. Mr. Jones said, 'Yes, so I understand.' I stated in a general way the terms of that agreement and concluded by saying, we are now ready to close up our trade with you. Mr. Jones said, 'Yes.' I said, this can be done now merely by your making a satisfactory deed, and that we will make the payment. Mr. Jones said, 'Yes.' I said, that we will make the payment, which I understand is \$134,000, according to the tentative agreement. Mr. Jones says, 'Yes, but now the property will cost you more money; it will cost you \$144,000.' I says, 'What is



(Testimony of J. R. Holman.)

the extra ten thousand dollars for?' Mr. Jones says, 'Well, we considered this trade closed over a year ago and there is a matter of interest,' Mr. Bridges broke into the conversation at that point and said to Mr. Jones; 'I don't see how you can take that stand. You have been in possession of the property all the time, and it has been understood and agreed between us that this matter was held up awaiting negotiations with the city.' Mr. Jones broke into Mr. Bridges' talk and said: 'That makes no difference. [135] That property will now cost you \$144,000.' I says, 'Mr. Jones, we will never consider that for a minute; we will not pay that price.' Mr. Jones said, 'You will either pay that price or not get the property.' I says, 'Well, we will not take the property at that price. I will not agree to it.' Mr. Jones remarked, 'Well, either you or somebody else will pay that price before you get the property.' He appeared during the latter part of the conversation very much irritated. He was flushed in the face and went out of the office after saying these last words, or rather, slammed the door after him as he went out." That was the end of the conference. After that I never had any consultation or negotiation with any representative of the Northwestern Lumber Company. No representative of the company ever sought any further conference or further negotiation relative to this deal prior to the time in August when there was a tender of deeds and demand for payment of the money. At the time of the conference in September, 1910, the railroad was

(Testimony of J. R. Holman.)

owned by the Oregon-Washington Railroad & Navigation Company. This property was intended to be used for right of way purposes and would be of no value for any other purpose.

“Q. After this final conference in September, 1910, what, if anything, was done by the Railroad Company to acquire right of way or railroad tracks, or rights into the city of Hoquiam?

“A. Well, immediately following the break with Mr. Jones, September 9th, I began work on alternative plans for entering Hoquiam, abandoning in my mind the main plans—the use of the Northwestern Lumber Company’s property, at least the amount covered by this agreement. We worked on various plans and at various times until in May, 1911, we reached an agreement with the Northern Pacific Railway for the use of their right of way into Hoquiam, their bridge across the Hoquiam River, the use of their station grounds in Hoquiam, incident to a joint agreement by which we both used certain rights of way in Aberdeen and Cosmopolis devoted to joint use.”

That agreement with the Northern Pacific gave us terminal facilities, both freight and passenger, in Hoquiam. The agreement with the Northern Pacific runs nine hundred and ninety-nine years. We began operation into Hoquiam over the Northern Pacific right of way in September, 1911. Our plans to operate were made known in May, 1911, but delay was caused [136] by the construction of a bridge across the Hoquiam River. The agreement with the



(Testimony of J. R. Holman.)

Northern Pacific was entered into in May, 1911. Our company could now make no use of the property covered by the negotiations with the Northwestern Lumber Company. Immediately after our contract with the Northern Pacific, public announcement was made in the newspapers.

On cross-examination the witness testified:

After the death of Mr. Baldwin, June 16, 1909, until July 1st, the office of chief engineer was vacant. This Hoquiam situation was taken up by me July 6th. From July 1st to the 6th other urgent matters occupied my attention. There was not a word said about the bridge during my talks with Mr. Jones July 6th or 7th. The main point I went down to consider related to the vacation of 9th Street. Indirectly I understood from Mr. Gordon that Mr. Jones had suggested certain changes in reference to the contract agreement, and as far as I know these changes related to street crossings, which we had no difficulty in adjusting to the satisfaction of both parties. It was a mere detail. When the contract came to me from the Northwestern Lumber Company with the bridge clause in it, I carefully reviewed the contract and discovered this bridge clause and realized the handicap that it put upon us in negotiating with the city for franchise crossings there.

“Q. Now, in what way did that operate as a handicap, in your opinion?

“A. As I looked at it, this agreement made it obligatory on us to enter into an agreement with the



(Testimony of J. R. Holman.)

city for a bridge. There was a wide difference of opinion with the city as to the character of the bridge, the kind of type and class of structure, and it left us with no recourse whatever to have our views obtain. We had to accept the decree of the city if we bought the right of way subject to that condition; if we had agreed to it." [137]

That was my view of this contract and the reason why I objected to it. I also objected to a common user bridge. There were two objections; one that it handicapped us in our negotiations with the city even if we agreed to the common user bridge; second, I objected strongly to the common user bridge.

"Q. In other words, you thought that you could deal with the city a little more liberally if the consent of the Northwestern Lumber Company was given that the common user clause be left out of the contract?

"A. Yes, I thought perhaps we could prevail upon the city to recede from their demands for a common user bridge. Personally, I did not know that Mr. Baldwin had promised about this common user bridge."

I do not know what Mr. Baldwin did in his lifetime. When I had my conversation with Emerson I understood that there was a franchise pending at Hoquiam for franchises and other matters relating to the Railroad Company's rights of way. I talked to Mr. Emerson as a member of the city committee. I had an idea that we could get the city to recede from its demand for a highway bridge. I got that

(Testimony of J. R. Holman.)

idea from conversations I had with members of the city council. I was urging the city council to recede from its demand for a highway bridge at that place. I did that at our meeting on September 3d. I showed them on the map that the citizens had an alternative crossing where they could get another bridge. They were favorably impressed with it and were considering it. Mr. Emerson broke in and said the Northwestern Lumber Company would law them forever before they would let them go through on that crossing. At my talk with Mr. Emerson on the 20th of September, 1909, I agreed with him that this matter (of a formal contract on account of the bridge controversy) might remain [138] in abeyance. At that time we were negotiating with the city with respect to the bridge.

“Q. You were relying upon securing this property from the Northwestern Lumber Company?

“A. Yes.

“Q. And the reason agreed upon between you and Mr. Emerson for letting the form of contract remain in abeyance was that you might reach an agreement with the city that might be satisfactory all around?

“A. Yes, sir.”

The delay in pushing matters was on account of the city council. The agreement reached with the citizens' committee in September, 1910, was predicated upon a joint survey which was to be made, and a map prepared showing the definite location of the two bridges, and then we were to make joint application to the War Department if these franchises



(Testimony of J. R. Holman.)

were granted. The agreement with the citizens' committee contemplated that we were to co-operate, provided we got a permit from the War Department to construct two bridges and we got our franchise from Hoquiam. It was our intention to proceed with building the railroad according to the plan. Notice of intention to abandon this plan was given to the city of Hoquiam in May—not before May. In my mind I definitely abandoned the plans of acquiring the entrance to Hoquiam by acquiring the land from the Northwestern Lumber Company. I told Mr. Farrell and Mr. Bridges that day, that is, September 9, 1910, that I considered that trade was closed. Mr. Jones' attitude was immovable. We could never get together on it, and we began to prepare other plans that day.

I did not conceive the idea of going in over the Northern Pacific. Mr. Farrell had control of this whole matter,—was Vice-president and General Manager of the Oregon-Washington [139] Railroad & Navigation Company. Mr. Farrell is the man who exercised control of property matters in the State of Washington at all times during this negotiation. After September 9, 1910, when that conference with Mr. Jones occurred, we spent a short time surveying the approach at Simpson Avenue. I don't remember whether any bridge plans were prepared. There might have been some alignment plans, but the surveys were conducted by my assistant engineer Isaacs. I don't remember that plans were filed with the city council. The bridge plans



(Testimony of J. R. Holman.)

were filed with the city council after September 9th. Whatever Isaacs did was done under my authority. Prior to this conference of September 9th I had given instructions for a survey following out the conditions. I cannot say what Mr. Isaacs did pursuing previous instructions, that is, instructions previous to September 9th. I do not remember calling him off the work, because I don't recollect that he was on the work.

“Q. Your statement now is, absolutely nothing was done after September 9th with reference to carrying out the terminal plans at Hoquiam as contemplated before that date?”

“A. Answering that question literally, I will say nothing was done contemplating carrying out the terminal plan arranged before that date.”

And on re-examination the witness testified:

My attitude was always against a common user bridge. Mr. Emerson was strongly insistent upon a common user bridge. On this question Mr. Emerson took the city's side. When Mr. Emerson left to go abroad, Mr. McGlaughlin, manager of the Northwestern Lumber Company, took his place. Mr. McGlaughlin strongly contended for a common user bridge, and took the part of the city in all questions of difference between us [140] with reference to the location, division of expense, etc. At a conference some time in the spring of 1910, at which Mr. Farrell was present, Mr. Farrell openly complained that the Northwestern Lumber Company were actively opposing the railroad in these nego-

(Testimony of J. R. Holman.)

tiations with respect to the bridge. Mr. McGlaughlin was present at that conference. Mr. McGlaughlin stated that he was there as representative of the Northwestern Lumber Company. After my conference with Mr. Jones on September 9, 1910, I was trying to work out some plan to get across the Hoquiam River irrespective and aside from the previous negotiations with the Northwestern Lumber Company. One plan contemplated using the Simpson Avenue crossing which we had originally contemplated, curving well off an approach to the bridge so as to get on to Levee Street and avoid the Northwestern Lumber Company's property. There might have been some surveys made using the original alignment in order to fix the exact location of this alternative line. Then we went further up the river to another crossing which had been considered. I had in contemplation condemning some of the property of the Northwestern Lumber Company. Prior to September 9th various work had been done in the way of getting up plans and details and estimates, consulting engineers, and discussing various plans with the city. Before I became engineer I learned that the plan for a city bridge at Simpson Avenue had been of long standing.

Thereupon the defendant rested. [141]

The license of the Northwestern Lumber Company to do business under the laws of the State of Washington as a foreign corporation was admitted.



**[Deposition of C. H. Jones, for Plaintiff (Recalled).]**

C. H. JONES, on being recalled, in reply, further testified by deposition:

“Q. On the occasion of meeting Mr. Holman in the city of Seattle in September, 1910, after the so-called bridge agreement had been made, did you in substance or at all state that if the railroad company wished the property it would have to pay \$10,000 more than the amount provided for in the contract?

“A. No, sir; I did not.

“Q. Did you in substance, or at all, demand any sum or amount more than that named in the contract?     A. No, sir.

“Q. Did you at any time or on any occasion ever request a payment of more money than what interest might be due?

“A. No, sir. On the contrary, I positively stated that there was no change in the price, but I thought we ought to be entitled to interest.

“Q. Did Mr. Holman notify you at that time, or at any time, that the contract for the purchase of this land in this suit was terminated for that reason?

“A. No, sir.

“Q. Was there ever any controversy between you or any officials of the company, excepting upon the subject of whether or not there should be interest paid?

“A. Nothing, only the question as to whether there should be interest paid or not.

“Q. Did you or your company, so far as you know, have any knowledge prior to May, 1911, that the rail-



(Deposition of C. H. Jones.)

road company, the defendant, did not intend to carry out this contract?

“A. Nothing. We always supposed they would carry it out and expected us to do so.

“Q. Was your first knowledge on that subject when you saw the account in the Hoquiam papers about May, 1911? A. About that time.

“Q. What steps did you take after that to protect what you considered the rights of the plaintiff company? [142]

“A. I put the matter in the hands of Mr. Austin Griffiths, as attorney, to bring it before the railroad company.”

And on cross-examination:

“Q. And you have nothing now that you can add to your original direct testimony as to what occurred in that interview ‘(Referring to the interview in Holman’s office in September, 1910.)

“A. Nothing; only that I don’t know why I didn’t remember that Mr. Bridges was present.”

I now recall that Mr. Bridges was present. I understood that the conference was for the purpose of closing up our negotiations. If they were ready, we were.

“Q. It (referring to the negotiations) was not closed *at interview*, was it? A. No.

“Q. Why?

“A. Because the question of interest came up in regard to the amount which should be paid, and Mr. Holman did not have any desire or any authority to consent to that, and therefore the interview was

(Deposition of C. H. Jones.)

carried on in that kind of a way until there did not seem to be anything coming from it. I told them they should take it up with their principals and see if they didn't think that we should have some interest.

"Q. You were willing to close the matter at that time unless they should concede you an additional sum by way of interest, or for some other reason?

"A. I don't know that I was unwilling to, but I thought we ought to have interest and that they ought to give that consideration.

"Q. Didn't you state in your former testimony that you demanded interest and refused to settle the matter unless it was conceded?

"A. I don't think that I demanded it, only that I thought we ought to be entitled to interest, and wanted them to consider it that way. \* \* \* I just called their attention to the interest matter, and that we ought to be entitled to interest; the matter had been delayed so long time.

"Q. Didn't Mr. Holman, in that interview, in the presence of yourself and Mr. Bridges, state that his company would not pay anything in addition to the amount named in the previous negotiations? [143]

"A. He stated that he didn't think the company would pay anything more than \$134,000."

I didn't think that at any time we changed the price. As far as the interest was concerned, they were to consider it. I didn't understand that we would not trade any other way, but wanted them to consider the interest matter.

(Deposition of C. H. Jones.)

“Q. You never sought another conference, did you?

“A. No, I did not, until I made demand on them and presented the deeds to them through our attorneys.”

That was after the deal with the Northern Pacific was announced. I made to them the proposition then, I think, that if they were willing to complete the deal, we would cancel the interest or any other demand. I don't know just what it was. The deeds tendered named a consideration of \$134,000. These deeds were prepared by our company and signed by me, before we called on the railway officials.

“Q. Mr. Jones, referring again to this interview in September, 1910, is it not a fact that when you left the room you remarked in substance, that they would either have to pay the amount you were claiming or that they would not get the property?

“A. No, sir, I did not.”

**[Testimony of Mr. Holman, in Surrebuttal.]**

Mr. HOLMAN, being called in surrebuttal, testified:

“Q. You have heretofore stated in your previous testimony, in substance, that with the termination of the interview with Mr. Jones in your office in the presence of yourself and Mr. Bridges, you considered the negotiations between the complainant and the railroad company as terminated and abandoned. Referring now to the correspondence which has been introduced by the complainant between yourself or your office and the officials of the city of Hoquiam



(Testimony of J. R. Holman.)

during September and October, 1910, please explain what that correspondence had reference to.

“A. When I considered the trade with the Northwestern Lumber Company abandoned and given up, I immediately began the preparation of plans for an alternative location of our line; an alternative location of depot and team tracks, but holding practically almost the identical location for a bridge, but avoiding this property that we had previously contemplated acquiring from the Northwestern Lumber Company, so that I therefore continued [144] my negotiations with the city for this bridge, for which we had a War Department permit bill on that location.

“Q. At what point were you contemplating locating station grounds under these alternative plans you had under consideration?

“A. On Block 38, between 6th and 7th streets, and between Levee Street and ‘I’ Street, in the city of Hoquiam.

“Q. What plans were under consideration for the acquisition of a right of way to reach that property?

“A. I had Mr. Bridges immediately begin the compilation of values on the property. I had my office begin preparing descriptions, so that we could file condemnation immediately if negotiations should not be carried out. We wanted to acquire the property quietly if we could, without making any public announcement of it.

“Q. Did that contemplate acquiring any of the property embraced within the previous negotiations

(Testimony of J. R. Holman.)

with the complainant?

“A. The intention was to avoid entirely the property previously covered by the Northwestern Lumber Company’s negotiations, although it was realized that we might have to acquire a very narrow strip fronting along Levee Street, which would be a very small fraction of that previously required.”

On cross-examination the witness testified:

“Q. Did you notify the Northwestern Lumber Company of this intention of yours to change your terminal location?     A. No, sir.

“Q. Did you notify them that you would not require their property?

“A. I did. I didn’t notify them that we would not require it, but that we would not pay the price asked by Mr. Jones.

“Q. Did you notify them that you would not pay \$134,000?

“A. I notified them that we would pay \$134,000.”

On re-examination:

“Q. At what time did you notify them you would pay \$134,000?

“A. At the interview in my office in September, 1910, I told them we were willing to take the property and would pay \$134,000 for it. At his demanding an increased price of \$144,000, I told him we would not pay it.

“Q. After that interview or conference did you ever have [145] another further conference or interview with any of the officials of the complainant with reference to acquiring the property em-

braced in the original negotiations?      A. No, sir.

“Q. Or any part of it?      A. No, sir.” [146]

On reply the following letters were introduced by the complainant as exhibits:

**“Complainant’s Exhibit A–F.**

Seattle, September 23d, 1910.

Mr. J. D. Moughmer,  
City Engineer,  
Hoquiam, Washington.

Dear Sir:—

Our recent surveys indicate that there is ample room in Simpson Avenue for the two bridges upon our revised alignment. I am handing you herewith a print of our drawing No. 262–H, which shows this.

While the sidewalk on the bridge is apparently very close to the burner, you will probably recall that this extreme diameter of the burner comes below the wharf level.

We are proceeding on the preparation of the map and plans for accompanying application to the War Department, and when we have it sufficiently advanced to be passed upon will ask you to kindly come up and go over it with our Bridge Engineer.

Yours truly,  
(Signed) J. R. HOLMAN,  
Assistant General Manager.”



**Complainant's Exhibit A-G.**

“Hoquiam, Wash. Sept. 29, 1910.

Mr. J. R. Holman,

Asst. Gen. Mgr. O. & W. Ry.

Seattle, Wash.

Dear Sir:—

Your favor of the 23rd inst., enclosing print of your drawing No. 262-H, is at hand.

I have taken the matter up with our committee, and we have studied the matter thoroughly and have decided that the best interests of all concerned require that you establish your center line Eighteen (18) feet north of the center line of Simpson Avenue produced, instead of Twelve and one-half ( $12\frac{1}{2}$ ) feet, as indicated on your print. This will leave Thirteen (13) feet clearance from the north truss of your bridge to the north line of the avenue, which, in our opinion, should be ample. It will also leave the same clearance between the city bridge and the south line of the avenue.

It is the intention of the city to build a bridge with a Twenty-two (22) foot roadway clear and a sidewalk on the south side Eight (8) feet clear. [147]

Hoping that this arrangement will be satisfactory to you and looking forward to the speedy construction of both bridges, I remain,

Very truly yours,

JDM/OEH.

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City Engineer.”

**Complainant's Exhibit A-H.**

“Seattle, September 30th, 1910.

Mr. J. D. Moughmer,  
City Engineer,  
Hoquiam, Washington.

Dear Sir:—

Your letter of the twenty-ninth instant simply re-opens an old question which was settled in our agreement, which it is of no further benefit to discuss. We intend to comply strictly with our agreement and clear the center line of Simpson Avenue, placing our bridge so that the super-structure will be entirely North thereof. We will expect and of course prepare our plans on the assumption that you will likewise comply with this agreement.

We will have the maps ready for your inspection on Wednesday, October fifth, and would like to have you come up here and look over the maps with us.

Yours truly,  
(Signed) J. R. HOLMAN,  
Assistant General Manager.”

**Complainant's Exhibit A-I.**

“Hoquiam, Wash., Oct. 1, 1910.

Mr. J. R. Holman,  
Asst. Gen. Mgr. O. & W. Ry.  
Seattle, Wash.

Dear Sir:—

Your letter of Sept. 30th at hand.

I am instructed by the Committee to say in reply that the location outlined in my letter of Sept. 29th and as shown on the accompanying blue-print is the

only one we will accept, and it will be useless for you to prepare your plans on any other basis.

It will not be convenient for me to come to Seattle upon the date you mention.

Very truly yours,

JDM/OEH.

\_\_\_\_\_,  
City Engineer." [148]

**Complainant's Exhibit A-J.**

"Seattle, October 3rd, 1910.

Mr. J. D. Moughmer,

City Engineer,

Hoquiam, Washington.

Dear Sir:—

I have your letter of the first instant, together with print you referred to, and I note that it will not be convenient for you to come to Seattle to look at the maps we have prepared to accompany the proposed applications to the War Department for permits for our respective bridges. Under these circumstances I am sending you herewith a print of the location map. These for your inspection and remarks.

Referring more particularly to the subject of the location of the railroad company's center line. It is our intention that this matter be finally and definitely disposed of by the agreement which was to the effect that the Railroad Company's bridge would be constructed with its superstructure entirely North of the center line of Simpson Avenue and the City's bridge constructed south of the center line of Simpson Avenue. At least this is our interpretation of that agreement, and if you do not concur I would



be glad to have the Committee point out where we are at variance. It seemed to me that it was thoroughly discussed and understood that the above would be the arrangement. If your Committee stands ready to contend that it shall dictate the location of the Railroad Company's bridge further than that outlined in the agreement, I would be pleased to be definitely so informed by them.

Yours truly,

(Signed) J. R. HOLMAN." [149]

Exhibits introduced in reply to defendant's testimony:

Copy of "Hoquiam Washingtonian," dated May 4, 1911, announcing joint user bridge contract between Northern Pacific Railway Company and Oregon-Washington Railroad & Navigation Company, and Chicago, Milwaukee & St. Paul Railway Company. This is the announcement referred to in the testimony of Mr. Bridges, and is material only so far as it shows announcement of the arrangement with the Northern Pacific on that date.

Complainant's Exhibit "B" is the copy of the contract between the Citizens' Committee, signed by McGlaughlin, Mourant and Moughmer, and Grays Harbor & Puget Sound Railroad Company, signed by Holman, under date of September 9, 1910, the substance of which exhibit is that the railway company would build a lift-bridge on one side of Simpson Avenue, and that the city and railway company will join in building the piers of sufficient length to enable the city to build a lift-bridge on the other side; the city to have the right to proceed with its con-

struction of the bridge whenever it chooses, but to join in the construction of the piers.

Complainant's Exhibit "A" is the record of a deed from the Grays Harbor & Puget Sound Railway Company to Oregon and Washington Railroad Company, under date of June 27, 1910, which deed, after specific description of property conveyed, contains the following:

"Also all and singular the right of way and other rights of every kind and character heretofore acquired or hereafter to be acquired in any manner whatsoever by the said Washington corporation in aid of any connection with the aforesaid railroad route, and any and all other railroad routes or rights of way of the Washington corporation in the State of Washington now or hereafter surveyed or located or hereafter to be acquired \* \* \* . Subject, however, to any and all existing liens, and charges upon the said premises hereby conveyed, or any part thereof, all of which the Oregon corporation (the grantee) hereby assumes and agrees to pay." [150]

Complainant's Exhibit "C" is the record of a deed from the Oregon and Washington Railway Company to the Oregon-Washington Railroad & Navigation Company, dated December 23, 1910. Part of the description is as follows:

"All the railroad and telegraph lines of the vendor, together with all the rights, powers, immunities, privileges, franchises and all other property appertaining thereto, subject to the rights of the Chicago, Milwaukee & Puget Sound Railway Company relating to joint ownership \* \* \* . All appropri-



ation of real estate and other property made by the vendor, and all suits, actions or rights of action instituted by the vendor for the condemnation of property for use in connection with any railroad of the vendor, or any branch or extension thereof. To have and to hold the above railroad, telegraph lines, franchises, rights, contracts and other property unto the vendee (Oregon-Washington Railroad & Navigation Company) and its successors and assigns. The vendee hereby assumes and agrees to keep and perform each and every of the contracts hereby assigned and transferred or intended to be assigned and transferred by the vendor to the vendee, and the vendor agrees to pay and discharge all the debts and liabilities, so that the property hereby conveyed shall be free from all debts and liabilities of the vendor." [151]

**[Certificate to Abstract of Testimony and Order Making Same Part of Record.]**

It appearing to the Court that the complainant, in accordance with the rules of this court, filed in this court an abstract of the testimony, a copy of which was upon the 28th day of February, 1914, served upon the defendants and each of them, in accordance with the rules of this court, and the defendants having examined said copy and served in due time upon the complainant certain amendments and corrections, which amendments and corrections have been accepted by complainant, and the original abstract having been corrected to conform thereto, and the parties having stipulated as to the correctness of said abstract, the Court does now certify that said



corrected abstract is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of said cause and constitutes all the substantial testimony therein material to the issue, and it is

ORDERED, That said abstract of testimony be and hereby is made a part of the record.

Dated April 2, 1914.

EDWARD E. CUSHMAN,

U. S. District Judge.

(Filed Apr. 2, 1914.) [152]

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### **Assignment of Errors.**

Now comes the appellant, the complainant in the District Court, and files its assignment of errors and says that the decree and order entered on the 22d day of November, 1913, is erroneous and unjust to complainant:

#### **I.**

Because the District Court failed to find and hold that that certain letter dated June 9, 1909, signed, in behalf of the defendant Grays Harbor & Puget Sound Railway Company, by H. F. Baldwin, and accepted by C. H. Jones in behalf of the complainant, Northwestern Lumber Company, together with the previous letters of the Northwestern Lumber Company under date of September 25, 1908, and October 2, 1908, constituted a binding contract upon the parties and obligated the defendant Grays Harbor & Puget Sound Railway Company, and its successors, Oregon and Washington Railroad Company and

Oregon-Washington Railroad & Navigation Company, to the performance of said contract.

## II.

The District Court erred in excluding from consideration and refusing to give effect to the testimony of George H. Emerson and C. H. Jones, and other testimony cumulative in character, tending to show that, prior to and contemporaneously with the said letter of June 9, 1909, there was an understanding between the said complainant, Northwestern Lumber Company, and the said Grays Harbor & Puget Sound Railway Company to the effect that the complainant, Northwestern Lumber Company, should not be called upon to co-operate with the said Grays Harbor & Puget [153] Sound Railway Company in obtaining any franchise for crossing the Hoquiam River at Simpson Avenue which should not provide for a highway bridge at said crossing, provided that the city of Hoquiam would pay its just proportion of the cost.

## III.

The Court erred in finding that the defendant Grays Harbor & Puget Sound Railway Company was justified in refusing and declining to sign the contract set forth in the complaint, which was signed and tendered by the complainant, in pursuance of the letter and acceptance thereof dated June 9, 1909.

## IV.

The Court erred in finding that the defendant Oregon-Washington Railroad & Navigation Company, successor to the Grays Harbor & Puget Sound Railway Company, tendered full performance of the

contract between the parties on September 10, 1910, by declaring its willingness to pay on that date the sum of one hundred thirty-four thousand dollars (\$134,000.00), without any additional sum for interest.

V.

The Court erred in holding that the expression of willingness by J. R. Holman, on September 10, 1910, to pay the sum of one hundred thirty-four thousand dollars (\$134,000.00) constituted an offer and tender of performance by the defendant Oregon-Washington Railroad & Navigation Company and was sufficient in equity to relieve the said defendant of its contract obligation.

VI.

The Court erred in refusing to hold and find that the said defendant Oregon-Washington Railroad & Navigation Company, is estopped to claim release from said contract by [154] virtue of its offer to pay the sum of one hundred thirty-four thousand dollars (\$134,000.00), on account of its failure thereafter to notify complainant of its intention to forfeit said contract, and by permitting the complainant to proceed with performance of the contract on its part at large expense and with full knowledge.

VII.

The Court erred in refusing to enter a decree in said cause requiring the defendants Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, and Oregon-Washington Railroad & Navigation Company to enter into the formal contract prepared jointly by the



complainant and attorneys and officers of said defendants and executed and tendered by the complainant.

### VIII.

The Court erred in refusing to enter a decree for the specific performance of said contract, or, in the alternative, for damages for failing to perform.

### IX.

The Court erred in dismissing the complaint.

WHEREFORE, the complainant and appellant prays that the order dismissing the complaint be reversed and the District Court be directed to enter a decree of specific performance in conformity with the prayer of the bill, or in the alternative, directing the District Court to find and determine the complainant's damages by reason of the defendant's failure to perform their contract, and to enter judgment against the defendants therefor.

B. S. GROSSCUP,

W. C. MORROW,

Solicitors for Complainant.

(Filed Feb. 21, 1914.) [155]

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### **Petition for Appeal.**

To the Honorable EDWARD E. CUSHMAN, Judge:

The above-named complainant, feeling itself aggrieved by the decree made and entered in this cause on the 23d day of November, 1913, does hereby appeal from the said order and decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of error which

is filed herewith, and it prays that its appeal may be allowed and that citation issue as provided by law, and that the transcript of the record, proceedings and papers upon which said appeal is based, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California; and your petitioner further prays that the proper order touching security to be required of it to perfect its appeal be made.

B. S. GROSSCUP,

W. C. MORROW,

Solicitors for Petitioner.

**Order [Granting Petition for and Allowing Appeal].**

The foregoing petition is granted and the appeal allowed upon giving bond, conditioned as required by law, in the sum of five hundred dollars (\$500.00).

Dated February 21, 1914.

EDWARD E. CUSHMAN.

(Filed Feb. 21, 1914.) [156]

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**Bond for Appeal.**

IT IS STIPULATED: That we, Northwestern Lumber Company, as principal, and J. J. Hewitt as surety, acknowledge ourselves to be jointly bound unto Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, Oregon-Washington Railroad & Navigation Company, and Chicago, Milwaukee & Puget Sound Railway Company, defendants and appellees in the above cause, in the sum of FIVE HUNDRED DOLLARS (\$500.00), conditioned that, whereas, in the District

Court of the United States for the Western District of Washington, on the 22d day of November, 1913, in a suit depending in that court, wherein Northwestern Lumber Company was complainant, and the above-entitled obligees were defendants, numbered on the Equity Docket No. 1866-C, a decree was rendered dismissing the bill of the complainant, and the complainant having petitioned an appeal from the said decree and order, and having filed a copy thereof in the office *of the office* of the Clerk to reverse the said decree, and a citation directed to the said defendants and appellees, admonishing and directing them to appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California.

NOW, if the said appellant, Northwestern Lumber Company, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void; else to remain in full force and effect.

If any condition hereof be *reached*, the Court may upon ten days' notice to the sureties proceed summarily herein to ascertain the amount due, to render judgment, and to award execution therefor.

NORTHWESTERN LUMBER COMPANY.

By C. H. JONES, [Seal]

Its President.

C. H. JONES,

J. J. HEWITT,

Surety. [157]



**Order Approving Bond.**

The above bond having been presented to me, and having been examined by me, the same is approved, both as to form and sufficiency.

EDWARD E. CUSHMAN,  
U. S. District Judge.

(Filed Feb. 21, 1914.)

Western District of Washington,  
Southern Division,  
County of Pierce,  
State of Washington,—ss.

J. J. Hewitt and C. H. Jones, sureties named in the foregoing bond, being duly sworn each for himself says: I am a resident and a householder within the Western District of Washington, and am worth the sum of Five Hundred Dollars over and above all my debts and liabilities, exclusive of property exempt from execution.

C. H. JONES.

J. J. HEWITT.

Subscribed and sworn to before me this 20th day of February, 1914.

[Notarial Seal] W. C. MORROW,  
Notary Public in and for the State of Washington,  
Residing at Tacoma. [158]

*In the United States District Court for the Western  
District of Washington, Southern Division.*

No. 1866—C.

NORTHWESTERN LUMBER COMPANY, a  
Corporation,

Complainant,

vs.

GRAYS HARBOR & PUGET SOUND RAIL-  
WAY COMPANY et al.,

Defendants.

**Praecipe for Record.**

To Frank L. Crosby, Clerk United States District  
Court, Western District of Washington:

In the above-entitled cause you are directed to prepare, certify and forward to the Circuit Court of Appeals for the Ninth Circuit, as the record in said cause, the following papers and none other; and that in preparing such record you omit from all papers, excepting the copy of this praecipe, all captions, verifications, and other endorsements, excepting only the name of the paper and a notation as to the date of its filing:

1. Bill of complaint.
2. Demurrer to bill.
3. Opinion of Honorable Frank Rudkin overruling demurrer.
4. Answer of deft. Ore.-Wash. Rd. & N. Co.
5. Opinion of Honorable Edward E. Cushman, District Judge.
6. Final decree of dismissal.

7. Abstract of testimony and certificate of Judge.
8. Assignments of error.
9. Petition for appeal and allowance.
10. Bond on appeal and approval.

B. S. GROSSCUP,  
Solicitors for Complainant.

(Filed April 3, 1914.) [159]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record, etc.]**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages *number* from 1 to 160, inclusive, contain a full, true and correct transcript of the record and proceedings in the case of Northwestern Lumber Company vs. Grays Harbor & Puget Sound Railway Company et al., lately pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this court at the city of Tacoma, in the District aforesaid.

I further certify and attach hereto the original Citation, and original order extending time to May 18th, 1914, for filing transcript of record.

I further certify that the cost of certifying the foregoing transcript amounted to the sum of \$133.30, which amount has been paid to the Clerk by the solicitor for appellant.



ATTEST my official signature and the seal of this court, at Tacoma, in said District, this 11th day of May, A. D. 1914.

[Seal]

FRANK L. CROSBY,  
Clerk.

By E. C. Ellington,  
Deputy Clerk. [160]

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*In the District Court of the United States, for the  
Western District of Washington, Southern Di-  
vision.*

No. 1866—C.

NORTHWESTERN LUMBER COMPANY,  
Complainant,

vs.

GRAYS HARBOR & PUGET SOUND RAIL-  
WAY COMPANY, OREGON AND  
WASHINGTON RAILROAD COMPANY,  
OREGON-WASHINGTON RAILROAD &  
NAVIGATION COMPANY, and CHI-  
CAGO, MILWAUKEE & PUGET SOUND  
RAILWAY COMPANY,

Defendants.

**Citation [on Appeal (Original)].**

United States of America to Grays Harbor & Puget  
Sound Railway Company, Oregon and Wash-  
ington Railroad Company, Oregon-Washington  
Railroad and Navigation Company, and Chi-  
cago, Milwaukee & Puget Sound Railway Com-  
pany, Greeting:

YOU ARE HEREBY NOTIFIED, that in a cer-

tain case in equity in the United States District Court in and for the Western District of Washington, Southern Division, wherein Northwestern Lumber Company is complainant and Grays Harbor & Puget Sound Railway Company, Oregon and Washington Railroad Company, Oregon-Washington Railroad & Navigation Company, and Chicago, Milwaukee & Puget Sound Railway Company are defendants, an appeal has been allowed the complainant therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, California, thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and [161] speedy justice done the parties in that behalf.

WITNESS the Honorable E. E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, this the 3d day of April, A. D. 1914.

[Seal]

EDWARD E. CUSHMAN,

U. S. District Judge. [162]

We hereby acknowledge due service of the foregoing Citation on Appeal by receipt of a true copy of the same this 4th day of April, 1914, and do waive further service for and on behalf of each of the defendants and appellees herein named.

BOGLE, GRAVES, MERRITT & BOGLE,  
Solicitors for Grays Harbor & Puget Sound Railway Company, a Corporation, Oregon and Washington Railroad Company, a Corporation, Oregon-Washington Railroad and Navigation Company,

a Corporation, and Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, Defendants and Appellees.

[Endorsed]: No. 1866-C. In the United States District Court, Western District of Washington. Northwestern Lumber Company, Complainant, vs. Grays Harbor & Puget Sound Railway Company et al., Defendants. Citation.

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[Endorsed]: No. 2423. United States Circuit Court of Appeals for the Ninth Circuit. Northwestern Lumber Company, a Corporation, Appellant, vs. Grays Harbor & Puget Sound Railway Company, a Corporation, Oregon and Washington Railroad Company, a Corporation, Oregon-Washington Railroad & Navigation Company, a Corporation, and Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Received and filed May 14, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 1866—C.

NORTHWESTERN LUMBER COMPANY,  
Appellant,

vs.

GRAYS HARBOR & PUGET SOUND RAIL-  
WAY COMPANY et al.,

Appellees.

**Order Extending Time [to May 18, 1914, to File  
Record on Appeal].**

For good cause shown, IT IS NOW ORDERED  
that the time within which the record on appeal in the  
above cause may be filed in the Circuit Court of  
Appeals in San Francisco, California, is hereby ex-  
tended to and including May 18th, 1914.

Dated April 30, 1914.

EDWARD E. CUSHMAN,  
Judge. [163]

[Endorsed]: No. 1866—C. In the District Court  
of the United States for the Western District of  
Washington, Tacoma. Northwestern Lumber Com-  
pany, Appellant, vs. G. H. & P. S. Ry. Co. et al.,  
Appellees. Order Extending Time. Filed in the  
U. S. District Court, Western Dist. of Washington,  
Southern Division. Apr. 30, 1914. Frank L. Cros-  
by, Clerk. By F. M. Harshberger, Deputy.



United States  
Circuit Court of Appeals  
For the Ninth Circuit

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NORTHWESTERN LUMBER COM-  
PANY, a corporation,  
*Appellant,*

VS.

GRAYS HARBOR & PUGET SOUND  
RAILWAY COMPANY, a corpora-  
tion, OREGON AND WASHING-  
TON RAILROAD COMPANY, a  
corporation, OREGON-WASHING-  
TON RAILROAD & NAVIGA-  
TION COMPANY, a corporation,  
and CHICAGO, MILWAUKEE &  
PUGET SOUND RAILWAY COM-  
PANY, a corporation,  
*Appellees.*

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION.

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**Brief of Appellant**

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B. S. GROSSCUP and  
W. C. MORROW,  
Solicitors for Appellant.

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**FILED**

**SEP - 5 1914**





No. 2423  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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NORTHWESTERN LUMBER COM-  
PANY, a corporation,  
*Appellant,*

VS.

GRAYS HARBOR & PUGET SOUND  
RAILWAY COMPANY, a corpora-  
tion, OREGON AND WASHING-  
TON RAILROAD COMPANY, a  
corporation, OREGON-WASHING-  
TON RAILROAD & NAVIGA-  
TION COMPANY, a corporation,  
and CHICAGO, MILWAUKEE &  
PUGET SOUND RAILWAY COM-  
PANY, a corporation,  
*Appellees.*

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION.

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**Brief of Appellant**

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NOTE:—All page references are to the printed transcript. The appellant was complainant in the District Court. The words complainant and appellant are used to designate the same party. By the words "Lumber Company," the appellant, Northwestern Lumber Company, is meant. By the words "Railway Company," the defendant and appellee, Grays Harbor & Puget Sound Railway Company, is meant.

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STATEMENT OF THE ISSUES.

The Bill of Complaint is based upon a contract between the complainant, Northwestern Lumber

Company, and the defendant Grays Harbor & Puget Sound Railway for the purchase of certain land in Hoquiam. The contract consists of a letter written by the Lumber Company to the Railway Company offering to sell and naming the price, covering three alternative propositions with descriptions sufficient for identification and specifying certain conditions of use for railway purposes (pp. 5-7). One of these propositions is accepted by letter with a collateral provision relating to the complainant's co-operation in securing franchises from the city. The deal was not conditioned upon the granting of the franchises. The co-operation asked for involved matters subsequent to the consummation of the purchase, not as a condition but a covenant.

The defendants Oregon and Washington Railway Company and Oregon-Washington Railway & Navigation Company each in turn purchased the rights and contracts of the company it succeeded and assumed the obligation to perform prior contracts.

All the defendants rely upon the same defenses summarized as follows: (1) No binding contract was ever consummated because (a) the written memorandum is not sufficiently complete to enable a court to ascertain its terms; (b) because it contemplated the execution of a formal document expressing the agreement of the parties, which was never signed by the Railway Company. The answers further set up the defense that the complainant refused



to enter into a formal contract according to the terms of the memorandum and finally refused to convey at the price named in the memorandum. Delay in bringing the suit is also tendered as a defense. Issue was made upon all of the affirmative defenses.

The District Court held on demurrer that the Bill of Complaint was sufficient. (P. 33.) On the trial presided over by another Judge, the complainant was held to have been at fault in refusing to comply with the terms of the contract. (P. 60.)

The memorandum of acceptance by the Railway Company of the Lumber Company's proposition, to which both parties gave their written approval, contained the following sentence:

“You shall give us your co-operation in  
procuring \* \* \* franchises in Ho-  
quiam.”

Also the following:

“A formal agreement shall be entered into  
pending actual transfers.”

The draft of the formal agreement prepared by the Railway Company contained the following:

“It is agreed by the first party” (Lumber Company) “and their officers that they will co-operate with the said second party” (Railway Company) “in procuring such franchises of the City of Hoquiam *as it may desire.*” (P. 17.)

The Lumber Company caused to be added the following sentence:

“It is also further stipulated by the party of the first part” (Lumber Company) “that such bridge” (referring to a proposed bridge on Simpson Avenue, mentioned elsewhere in the contract) “*may* be a joint user bridge with the City of Hoquiam, provided the City of Hoquiam contributes its share to the cost of construction and maintenance.” (P. 17.)

The document was re-written with the incorporation of this sentence proposed by the Lumber Company and signed by the Lumber Company in that form. The Railway Company objected, when the document was presented to them for signature, to the sentence added at the instance of the Lumber Company, and requested that it be stricken out, which request was denied.

The District Court held that the Lumber Company was at fault for not acquiescing in the request of the Railway Company to strike the sentence. The District Court held that the three sentences above quoted should be construed without taking into consideration any of the circumstances and conversations tending to show the subject to which they applied and all evidence offered tending to show the plans and structures contemplated at the time and before the memorandum was signed, to aid in construing the language in the light of surrounding circumstances should be disregarded. The exclusion from consideration of this testimony is alleged as

error.

The District Court held that the sentence used in the memorandum.

*“You shall give us your co-operation in procuring franchises in Hoquiam,”*

and the words proposed by the Railway Company in the formal agreement,

“It is agreed by the first party” (Lumber) Company “and their officers that they will co-operate with the said second party” (Railway Company) “in procuring such franchises of the City of Hoquiam *as it may desire,*”

expressed in equivalent terms the same obligation.

In this construction placed upon the two clauses by the Court, even without the aid of surrounding circumstances, the District Court erred.

The District Court construed the qualification added at the instance of the Lumber Company,

“It is also further stipulated by the first party” (Lumber Company) “that such bridge *may* be a joint user bridge with the City of Hoquiam, provided the City of Hoquiam contributes its share to the cost of construction and maintenance,”

as meaning an absolute undertaking on the part of the Railway Company, on the conditions stated, to build a joint bridge. This construction, even without the aid of surrounding circumstances and conver-



sations shown by the parol evidence was error. The context affords no basis for construing the word “may” into “shall.” On its face the language expresses a consent. The evidence shows such was the intention.

The Lumber Company declined to cut out of the proposed formal agreement the stipulation consenting to a joint bridge. The Railway Company then requested that the execution of a formal agreement should be delayed pending an adjustment with the City which might result in eliminating the point in dispute as immaterial. This request for postponement was granted. The District Court held that acquiescence in the request of the Railway Company to postpone the execution of the formal agreement amounted to a postponement of the time of payment for the land, and in consequence the Lumber Company was not entitled to interest from the time when the money was payable under the contract to the date when the Railway Company was ready to perform and pay the money. This holding of the District Court was error.

The District Court held that assuming the original memorandum constituted a binding contract between the parties and its efficiency as a contract was not impaired through fault of the Lumber Company, the Railway Company was released from the obligations of the contract by its offer to pay the contract price without interest for the land on Sep-

tember 10, 1910, and that the refusal of the Lumber Company to accept the contract price without interest amounted to a rescission of the contract, even though the Lumber Company in good faith may have considered itself entitled to interest. In that holding the District Court erred.

The District Court erred in holding that the Lumber Company was not entitled to reimbursement of its expenditures in the performance of the contract, and in the dismissal of the Bill.

#### STATEMENT OF THE EVIDENCE.

The City of Hoquiam lies on the north side of Grays Harbor in the State of Washington. The Hoquiam River, a navigable stream, divides the city. The major portion of the city, where the property involved in this suit is located, known as West Hoquiam, contains the principal business houses. The opposite side, called East Hoquiam, is a residential district. Simpson Avenue extends through the center of this east side district from the east bank of the river in an easterly direction. Eighth Street, on the west side, is the principal business street.

For more than four years prior to September, 1908, the city, through its officers, was planning to extend Simpson Avenue across the river by a bridge and thence to connect it through the plaintiff's property with Eighth Street.



“It was generally understood \* \* \* by the citizens of the town that the city would have to build a bridge at Simpson Avenue. In fact, the council about three years before instructed the engineer to make application to the War Department for a permit to put a bridge in there.” (P. 136.)

The connecting way between this bridge and Eighth Street would become a main artery of travel, whereas without the bridge the existing streets are off the line of travel and not adapted to retail trade. (P. 136.)

Prior to September 23, 1908, the Oregon and Washington Railroad Company began extending its lines into Western Washington and had created the defendant Grays Harbor & Puget Sound Railway Company, for the purpose of building a branch from Centralia to Hoquiam. J. D. Farrell was Vice-President of the Oregon and Washington Railroad Company and exercised general supervision over the Railway Company, whose affairs were directly handled by H. F. Baldwin, Chief Engineer, and J. B. Bridges, Vice-President and Attorney.

Shortly before September 25, 1908, these officers took up with C. H. Jones and George H. Emerson, President and Vice-President, respectively, of the complainant Lumber Company, the matter of terminal grounds and rights of way in Hoquiam. The complainant owned a large part of all the property desired. At the interviews a number of routes and sites of freight and passenger stations



were discussed. Street changes and street crossings were involved, requiring the action of the city, including provision for a highway bridge on the extension of Simpson Avenue.

“We said to Mr. Baldwin that any negotiations of this kind must be subject to the approval of the city in order to establish a highway bridge at that point, I mean a joint user bridge \* \* \*. Mr. Baldwin stated that there would be no trouble.”

(Emerson’s testimony, p. 91.)

“I think it was, at all times, fully understood and so discussed between us that all we desired was a street crossing, and that there was no stipulation as to the kind of a bridge, other than that it was agreed to build a satisfactory bridge.” (P. 85.)

On this subject Mr. Jones testified:

“Our talk with Mr. Baldwin preceded that letter, and at that time we had before us the maps of the City of Hoquiam.

“Q. At that time was there anything said about a bridge across the Hoquiam River on Simpson Avenue?

“A. Yes, sir; that was the first talk. That was the way that we suggested it to Mr. Baldwin, that there would have to be a bridge across there; that we had always contemplated a bridge there and that the city needed it for its connection with East Hoquiam and the main part of the city. We always considered that and it was a part of the talk with Mr. Baldwin, that a bridge would have

to be across there, and talked about different kinds of bridges.

“Q. What was said on the subject?

“A. That there would be no objection to that; that it could be arranged very easily.”

(P.p. 101-102.)

These consultations were followed by the complainant's letter of September 25, 1908, set forth by copy on pages 5, 6 and 7. The description of the property which it was proposed to sell is given with sufficient accuracy for identification. The three alternative propositions will be seen by reference to the map to overlap each other in many places. The difference related chiefly to the depot sites. The Emerson proposition, which was finally accepted, involved crossing the river on the extension of Simpson Avenue and covered the purchase of the East Half of Blocks 61 and 62 and a part of Block 51, and obligated the Company to join in dedicating a fifty-foot street through the center of Blocks 61 and 62. Protection of the use of the log pond was also provided. After this proposition was written and delivered to the Railway Company, it appears that Mr. Farrell called the Lumber Company's attention to the omission of a provision for the release of damages for crossing tideland lots in front of Simpson Avenue, and the bridge approaches, which omission was supplied by the Lumber Company's letter of October 24, 1908.

Further negotiations seem to have been suspended until June 9, 1909, when Mr. Emerson and Mr. Jones, on behalf of the complainant Lumber Company, and Mr. Baldwin, Mr. Gordon, and probably Mr. Isaacs, the Railway Company's local engineer, were all present. Concerning that interview Mr. Jones testifies:

“Q. You may state what was said at that interview.

“A. That they were compelled to accept the proposition called the Emerson route, and there were a great many matters discussed at this time, and there was also the matter of the *bridge question*, which always entered into the whole matter and was one of the elements which was considered *when we were making prices* for the right-of-way and property that the railroad was to have.”

An effort was made by Mr. Baldwin to secure the reduction of the price which Mr. Jones had named, and finally Mr. Baldwin said he had a telegram from Mr. Farrell from San Francisco to close the deal for the right-of-way from the Northwestern Lumber Company “on the best terms we can.” (P. 103.)

The letter accepting the Lumber Company's so-called Emerson proposition was drawn up by Mr. Baldwin, signed by him in behalf of the Railway Company and Mr. Jones signed for the Lumber Company. By the terms of this acceptance the Railway Company agreed to pay to the Lumber



Company for the land covered by the Emerson proposition the sum of \$134,000. The document then reads:

“We will present you a map showing in detail such proposition, and a formal agreement shall be entered into pending actual transfers.

“However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.”

It is then provided that payment should be made within twenty days after delivery of abstracts showing good title to the property and upon delivery to the purchaser of proper deeds, and that all buildings should be removed within six months from date of deed. (P. 8.)

Mr. Baldwin, on whom Mr. Bridges depended to prepare the technical description to be incorporated in the formal agreement, died about June 20th. The abstracts had been delivered to Mr. Bridges on June 12th and showed satisfactory title. A formal agreement entitled to record was provided for by the memorandum probably because the transaction involved certain incidental matters collateral to the real estate trade, among others the construction across the Lumber Company's log pond, the obligation of the Company to join in the dedication of a street across part of the property to be purchased, and the clause providing that the

Lumber Company should co-operate in procuring other properties in Hoquiam and also franchises in Hoquiam. A franchise for crossing Ninth Street had been discussed, and undoubtedly other street crossings required by the Railway Company were contemplated. It could not use its property without them. It is manifest, however, that this co-operation clause was a collateral matter which entered into the inducement of the respective parties for making the deal, but it pertains to the consideration and is not of the substance of the primary contract, relating to the sale of land which does not depend upon these collateral stipulations for its legal validity.

After the death of Mr. Baldwin, Mr. Holman succeeded to his office. The parties met the first few days in July to prepare the formal agreement. Mr. Bridges had examined the titles and found no objectionable flaw. The matter of working out technical descriptions had been left to the Railway Company's engineers, which turned out to be a task, and there was delay probably attributable in part to the death of Mr. Baldwin. Mr. Bridges and Mr. Emerson worked out a draft of the formal contract, which was sent to Mr. Jones at Tacoma. The time of payment was for some reason extended to the first day of August, as shown by Section 5 of the proposed formal agreement, which seems to have been acquiesced in by all parties, except that \$20,000 was to be paid upon its execution. Every-



thing seems to have been satisfactory in the paper originally prepared by Bridges, except paragraph 7, which was the last paragraph of the document, when it reached Mr. Jones. This paragraph reads (p. 17) :

“It is agreed by the first party (Lumber Company) and their officers that they will co-operate with the said second party (Railway Company) in procuring such franchises of the City of Hoquiam *as it* (Lumber Company) *may desire,*” etc.

This clause as drawn by Mr. Bridges would have obligated the Lumber Company to acquiesce in any franchise desired by the Railway Company, no matter how destructive such franchises may have been to the interests of the city at large. In view of the understanding between the parties, as to the form of the bridge structure contemplated and to which the Lumber Company would give its approval in the City Council, Mr. Bridges' language was too broad. Mr. Jones requested the insertion of a further paragraph, which in the draft set forth in the complaint and signed by the Lumber Company modifies section 7. The first part of the added section 8 (p. 17) relates to the construction of the railroad so as not to interfere with the log pond. This part was acquiesced in as expressing the understanding of the parties. The last sentence of the proposed section 8, was objected to when the document was finally presented to the Railroad Company's officers for signature although when it



was drawn it was apparently acceptable. (P. 84.)

The original contract provided: "You shall co-operate in procuring franchises in Hoquiam." The scope of these franchises and consequently the extent of the co-operation promised as applicable to the plans assented to by Mr. Baldwin was understood when the memorandum was signed. In the formal provision for a highway bridge. In the formal agreement the Railway Company sought to have the language of the original memorandum changed to require the co-operation of the Lumber Company in procuring such franchises of the City of Hoquiam as it (the Railway Company) *may desire*. This language if accepted would cancel the entire verbal understanding so far as pertained to a highway bridge across the river. Mr. Jones sought to limit the scope of the seventh clause by inserting the following concluding sentence:

"It is further stipulated by the first party (Lumber Company) that such bridge *may* be a joint user bridge with the City of Hoquiam, provided the City of Hoquiam contributes its share of cost of construction and of maintenance."

It will be noted that the provisions relating to the track over the log pond in the first part of the proposed section 8 are mandatory and require the Railway Company to protect the use of the Lumber Company's log pond. The last sentence can in no way be construed as requiring the Railway Company to join the city in the building of a bridge,

but its only possible effect is a limitation upon the extent to which the Lumber Company will co-operate with the Railway Company in the securing of franchises. The franchise presented by the Railway Company to the city council "was just asking for a franchise to use portions of certain streets to extend their line through the town." (Mourant, p. 141.) This franchise was presented to the city council prior to June 30, 1909. The exact date does not appear, and in connection with that there was some discussion with the city about the bridge. (Brides' testimony, p. 159.) The city did not assume to have jurisdiction over the permit to build a bridge across the Hoquiam River, which is navigable, but it had jurisdiction over the streets and rights requested in the Railway Company's proposed franchise. That was the leverage the city was proposing to use to preserve the Simpson Avenue crossing for highway purposes. It was the desire of Mr. Jones to give the city free rein in that negotiation, and for that reason he declined to bind himself to co-operate in any franchise which the Railway Company might desire, giving the Railway Company exclusive use of that crossing. There was no suggestion or intimation communicated by any official of the Railway Company to the city authorities or the Lumber Company that a common bridge was not contemplated. The railway officers professed to acquiesce in the general proposition. There was, nevertheless, a suspicion that the Company might want to monopolize this crossing. Mr.



Mourant in his later negotiations with the city “got the impression that they were really opposed to it,” (p. 140), notwithstanding “they denied that they were opposed to a joint user bridge, that is, they denied they were trying to block the city from getting a crossing over the river.” (P. 141.) Mr. Holman says that he preferred an exclusive railroad bridge. His state of mind seems to have sifted through his professions and to have resulted in the suspicion of his sincerity. In a little city like Hoquiam, it is common knowledge that a matter of popular interest is a subject of general street corner conversation. When franchises were discussed with Emerson and Jones by Baldwin, the city’s bridge project was acquiesced in, and that acquiescence *apparently* continued through the entire history of this litigation, but the undertone of suspicion, which probably prompted the Lumber Company to be careful not to bind themselves to a course before the city council contrary to the understanding when the contract was made, was well founded.

Mr. Holman testifies that he did not give attention to the common user bridge clause when the contract was finally put in shape at the conference on July 7th, when he and Mr. Jones and Mr. Emerson were present, and when the contract was signed, and did not know that it was there. Mr. Gordon, the Right-of-Way Agent, was present but for some reason has not been called as a witness in this case. It seems rather strange that practically the only



matter in controversy between the parties should have escaped Mr. Holman's attention, but about a week later when he was going over the contract at Seattle, he concluded that the modification of Section 7, inserted at the instance of Mr. Jones at the conclusion of Section 8, was objectionable. Mr. Holman says: "As I looked at it, this agreement was made obligatory upon us to enter into agreement made it obligatory upon us to enter into an agreement with the City for a bridge." (P. 176.) It is difficult to see how Mr. Holman, with the advice of able counsel, could have taken that view of the legal effect of the clause insisted upon by the Lumber Company. He further says: "I also objected to a common user bridge. There were two objections; one, that it handicapped us in our negotiations with the City even if we agreed to a common user bridge; second, I objected strongly to a common user bridge \* \* \*. I thought perhaps we could prevail upon the City to recede from their demands for a common user bridge. Personally, I did not know that Mr. Baldwin had promised about the common user bridge." (P. 177.)

Here is indicated a change of bridge plan after Baldwin died.

If he did not know *personally*, it would not have taken him long to find out. Looking back, we can see clearly that Mr. Holman, when he came into his position as Chief Engineer, succeeding Mr. Baldwin, did not share Mr. Baldwin's view as to

the desirability and unobjectionableness of a common user bridge. He conceived that he could accomplish his purpose of acquiring an exclusive crossing by getting the Lumber Company tied up by contract not to favor the City's side of the controversy, but on the other hand to co-operate with the Railroad Company in its effort to "prevail upon the City Council to recede from their demands for a common user bridge."

There is direct conflict of testimony between Bridges and Jones as to what took place when this clause was appended to section 8 of the formal agreement which was signed by the Lumber Company. Mr. Jones says it was inserted by Mr. Bridges without hesitation or objection when his attention was called to it. Mr. Bridges says it was inserted by Mr. Emerson, and that he referred the matter to Mr. Farrel, who objected to the clause. Apparently, Mr. Bridges, no matter who drew the clause, did not object until he had heard from Mr. Farrell. However, this part of the controversy we regard as immaterial except as tending to show that it conformed with Baldwin's understanding.. It is unnecessary to consider more than the uncontradicted testimony as to what took place during this important stage of the controversy. Mr. Jones testified:

"Q Did you state to Mr. Bridges any reason why you wanted that clause in the agreement?

“A It was,—we did not want to go on record in any other way. That was for the city and the railroad company as to what they should do. We wanted a bridge clause there, and we were only insisting that the city ought to have a right to say whether it wanted one or not, or to go in there with them, and we thought it would be no more than fair to have that clause in there. I did not want the city to think that we were against them.

“Q As I understand, you mean to say that you told him you did not want to be in a position to interfere with the city insisting upon a bridge across there?

“A We wanted it so it would be left to the city and the Railroad Company as to that, and we thought it was worded so that the Railroad and city should agree upon it.

“Q As I understand then, what you mean to say is that the substance of what you told him that you did not want to be in a position to interfere with the negotiations one way or the other between the Railroad Company and the city?

“A Yes, that is it. We wanted the city to act free and the Railroad also.” (Pp. 104, 105.)

The contract as set forth in the complaint was signed by the Lumber Company and forwarded on July 7th to the Railroad Company at Seattle. The letter of transmittal shows it was, the bridge clause included, acquiesced in by Mr. Holman (p. 84). The testimony of Mr. Emerson is corroborated by



the contemporaneous letter. Later, after hearing from Mr. Farrell, Mr. Bridges attempted to secure restoration of the document to the form as he originally prepared it.

Mr. Bridges, on July 16th, wrote to the Lumber Company as follows:

“Mr. Farrell, the General Manager of the Railroad Company, desires that this clause (above quoted) be stricken from the contract before it is signed by the Railroad Company. His position is that we are negotiating with the city of Hoquiam concerning the bridge rights, and he thinks that the matter of a common user bridge should be one to be left to adjustment altogether by the Railroad Company and the city. I so expressed myself to Mr. Jones, but at the same (time) he seemed to be of the opinion that the clause should remain in the contract.”

This is exactly what Mr. Jones was insisting on, but the change in the expression of that intent by striking out the modifying clause would have fallen far short of that mutual understanding and purpose. No change of language was requested by the Railway Company which attempted to express the understanding. Mr. Jones thought he had properly covered the point. If the Railway officials were acting in good faith it was their duty to suggest appropriate expression if they were dissatisfied, in place of attempting to gain an advantage.

The letter continues:

“We shall continue our negotiation with the

city concerning this matter and find out what disposition it has concerning the bridge, and will later advise with you about it. Meanwhile, we would like for you to consent to the clause quoted be stricken out, and if you will not so consent, then we ask that the matter may stand as it is until we can come to some definite arrangements with the city concerning the matter.” (P. 148.)

After the receipt of this letter, Mr. Emerson says he consented to allow the signing of the formal agreement to stand in obedience. Mr. Bridges further says:

“I had a conference with Mr. Jones in which I told him the Railroad people would not sign the contract with the common user bridge clause in it. That Mr. Farrell refused to approve it in that form, and asked him to cut it out of the contract. I explained to him that the Railroad Company had to go before the city council in order to get a franchise from the city and that such a clause in the contract it seemed to me was unnecessary for the protection of the city; that the city was in a position to protect itself and that such a clause would hamper us in getting our franchise. He said he must insist on that clause remaining in the contract, and refused to allow it to be stricken out. \* \* \* I told him \* \* \* that I understood the city was not in a position to pay its just proportion of a common user bridge, and if it were agreeable to the city not to have a common user bridge would he then cut it out? He said he did not understand the city would take any such position.” (Pp. 148-149.)

Here again we have the color of insincerity. The



contingency of the city being unable to pay was provided for by the objectionable sentence.

The instructions were, if modification by striking out the clause could not be secured, then to get indulgence of time for signing while the negotiation with the city was in progress.

The District Court apparently held that the conversations relating to the controversy between the parties subsequent to the signing of the memorandum and bearing upon the co-operation requirement of that contract negated the idea that the minds of the parties had agreed upon the matter in respect to which the parties should co-operate. He justifies this conclusion by pointing out that there was a dispute after the memorandum was signed as to the respective obligations of the parties pertaining to this co-operation in the procurement of franchises. The District Court in giving to this evidence the controlling weight which seems to have influenced his decision, overlooks the fact that whatever presumption might follow from such a dispute is overcome by the fact that Mr. Holman, who had charge of the subsequent negotiation of the phraseology of the formal contract, did not know what agreement Baldwin had made. He says, "I do not know what Mr. Baldwin did in his life time." (P. 177.) If he was not informed upon that subject, how could the fact that he was seeking to get more favorable terms throw light upon the scope of the original contract? The Court



further indicates that while this evidence of what occurred subsequently to the signing of the memorandum is competent to show that the parties' minds had not met when the memorandum was signed, that what occurred contemporaneously with the signing of that memorandum and prior to its signing is incompetent. This is exactly the reverse of the correct rule. The point in issue is to find out, first, whether the parties agreed, and then what they agreed upon.

Subsequent declarations might in a way reflect upon these issues if the person making the statement had knowledge, but where knowledge is disclaimed such subsequent declarations are entitled to no weight against direct and positive testimony as to what took place affecting the scope of the subject matter on which they agreed. The District Court shows that he dropped into this fundamental error by the authority which he cites and from which he quotes largely. (P. 70.)

It is perfectly clear that the Railroad Company officers, after Mr. Holman became Chief Engineer, were anxious to so shape the formal contract that the Lumber Company might be called upon to urge actively an exclusive railroad bridge. It is equally clear that at all times up to and including the signing of the memorandum on June 9th, nothing other than some arrangement which would admit of a street crossing was contemplated, and that the franchises would be so shaped that that result could be

brought about. Mr. Jones objected to putting his Company in a position where it might be compelled to oppose the city's plan and acquiesce in a request of the Railroad for an exclusive crossing. Consummation of the original contract, in so far as it pertained to the signing of the formal agreement, was postponed at the request of the Railway Company to give it the chance to negotiate with the city. This solution apparently conformed to the wishes and purposes of both parties. The Railway representatives would not be hampered before the council with the written consent of the Lumber Company to a joint bridge. The Lumber Company could not be called upon to co-operate to secure for the Railway an exclusive crossing.

But it was equally well understood that the postponement of the execution of the formal agreement by the Railway Company should not affect the substance and the potency of the original contract for the purchase and sale of the land. There was a telephone conversation between Mr. Bridges and Mr. Emerson on or about September 15th. At this time the formal agreement as signed by the Lumber Company and set forth in the bill of complaint was in Mr. Bridges' hands. It had not been signed by the Railwal Company on account of the circumstances above stated. Mr. Emerson requested Mr. Bridges to return the signed agreement.

“The withdrawal of the agreement was simply that it should be in our hands instead



of theirs.” (P. 86.)

He sent a messenger with the following note:

“Please deliver to the bearer the deed and any other papers that may be in your hands belonging to the Northwestern Lumber Company and connected with the right of way transaction pending between the Northwestern Lumber Company and the G. H. & P. S. Ry.” (P. 150.)

Mr. Bridges says he considered that, the Railway Company not having affixed its signature, the Lumber Company was entitled to be the custodian of the papers. There was no disagreement upon that point. Mr. Bridges, however, was determined that there should be no misunderstanding as to the effect of the return of the paper and that a record should be made “out of abundance of precaution.” Without repeating, we refer to the letter on page 21. Mr. Emerson says that the last sentence of Mr. Bridges’ letter:

“But by so returning to you it is not the intention of the Railway Company to waive any rights which it has with reference to the agreement to purchase this property, but I anticipate that it is not your intention that the handing of these papers to you shall have that effect,”

correctly states their understanding. There is no disagreement upon that point. Both parties understood that the land described in the agreement had been sold by the Lumber Company to the Railway



Company at the price of \$134,000, to be paid within twenty days after the signing of the original memorandum on June 9th. The only open controversy pertained to the collateral matter of franchises, the Lumber Company holding out for the right, according to its understanding with Mr. Baldwin, not to co-operate in the passage of an ordinance which would block Simpson Avenue to the uses of the city for highway purposes, while the Railway was asking that the Lumber Company bind itself to co-operate in any plan it might propose. The upshot of the discussion, was acquiescence by the Lumber Company in the request of the Railway Company to postpone the execution of the formal agreement with the expectation that the city and the Railway Company, through the intervention of the Citizen's Committee, which had been appointed as an advisory board, would reach a conclusion satisfactory to all parties. It appears to have been equally the determination of both parties to carry out the terms of the original memorandum. Aside from the direct evidence that such was the intention and understanding, we have the conduct of the parties. The Railway Company consummated other purchases in harmony with its general plan, pursued its negotiations with the city to the point of agreeing upon a bridge which would accommodate both railway and highway traffic and finally recognized the agreement after the bridge plans had been settled by offering to pay the net price of the contract. The Lumber Company in the meantime proceeded to build

a new store, costing something over \$40,000, upon a street which the consumation of the railroad plans would change from a side steet to a main thoroughfare; by the removal of buildings from the tract sold, and other large expenditures amounting to something over \$5,000 more.

Mr. Bridges recognized the fact when he took up with the city council the subject of franchises that there was a determined purpose on the part of the citizens to secure a highway bridge at Simpson Avenue, in which he and other officers of the Company apparently acquiesced, although both he and Mr. Holman state that the Railway Company would have preferred an exclusive bridge. A Citizen's Committee was appointed, and after numerous conferences, and the lapse of a year and two months time, a combination structure was agreed upon and a memorandum signed. On that day, according to the undisputed testimony, Mr. Holman, who became Assistant General Manager, notified Mr. Jones that he was ready to settle up.

Mr. Bridges in his testimony says that he wrote the letter of September 25th, returning the signed contract, out of "abundance of precaution." In view of his prominence in the negotiations at every stage, and in view of Mr. Holman's final expressed desire to settle up according to what he believed to be the obligations of the memorandum of June 9th, the act of Mr. Bridges in the writing and delivering of this letter was



the act of the Company, if not by virtue of original authority, at least by virtue of adoption afterward.

Relative to what took place in the Company's office at Seattle after the bridge agreement had been reached with the Citizens' Committee on September 10, 1910, there is a substantial conflict of testimony. It is agreed that Mr. Jones went to the office in response to Mr. Holman's invitation for the purpose of settling up. Mr. Jones' account of what took place is to the effect that after Mr. Holman told him "we can now fix up with you," he thought the Lumber Company should have interest on the amount of the purchase price; that they had kept the Company out of their money so long. Mr. Holman refused to pay interest. Jones told him to think it over, and that was about the end of it (pp.107-108). The Lumber Company had been at all times ready to carry out their contract and had at all times held the property subject to the agreement. No particular amount of interest was asked for or demanded, and no computation was made (p. 108). Mr. Holman states that Mr. Jones demanded \$10,000 by way of interest in addition to the \$134,000 provided by the contract. This Mr. Jones flatly denies, and states that he simply requested interest. Mr. Bridges says that after more or less talk Mr. Holman said:

"Now, Mr. Jones, we are ready to take up this deed for \$134,000 and pay you for it, but we will not pay you any more." (P. 154)



He further says that the amount demanded by Mr. Jones was \$144,000.

“Q Did not he say that that was interest?

“A I am inclined to think that he said in answer to Mr. Holman’s question as to what that ten thousand dollars was for, that it was interest.

“Q Interest on the amount of the contract?

“A He may have said that. I would not not be positive about that. I am inclined to think he said it was interest.” (P. 164.)

“Q Mr. Holman did not notify them, then, that there was no intention to carry out the contract?

“A Mr. Holman said he would not pay anything more than \$134,000.

“Q But he did not say he would not carry out the contract?

“A Not in these words. The talk there was, Mr. Holman, representing the Railroad Company, was willing to (pay) \$134,000 for the deeds. They were not willing to deliver the deeds for that price.” (Pp. 164-165.)

After this consultation, Mr. Holmman took up with the city of Hoquiam details concerning the bridge at Simpson Avenue in pursuance of the agreement with the Citizens’ Committee, and all in line with the carrying out of that agreement. Several letters were exchanged, the last being dated

October 3, 1910, (pp. 188-191, inc.). Mr. Holman, in explanation of these letters, says he intended to make such changes in the terminal plan at Hoquiam that the Railroad Company would have been enabled to avoid part of the property of the Lumber Company contracted for, but after September 10, 1910, he never had any interview or conference with the complainant Company or its officers.

All of the officers of the complainant state that during the months of September and October following they were actively going ahead constructing a new store building which had previously been started preparatory to vacating the old store, which was on the ground sold to the Railway Company, and removing other structures as they had agreed and otherwise preparing to carry out the contract. That all this work was under the eye of officials of the Railway Company, and that notwithstanding this, their first knowledge that the Railway Company had made other arrangements for entering Hoquiam was in the following May, when they saw in a newspaper that a contract had been made for the use of the Northern Pacific terminals. Immediately after this the Lumber Company took legal steps looking to the enforcement of the contract.

## LAW POINTS AND ARGUMENT.

Defendants, in the court below, took the position that the sentence appended to the contract at



the instance of Mr. Jones, representing complainant, enlarged the obligations of the Railway Company as contained in the June memorandum. The carefully selected words employed clearly show that the clause was intended to be permissive and not to impose an obligation. Mr. Jones so explained. Litterally the appended sentence objected to by the Railway Company goes no further than to express the consent of the Lumber Company to the building of a joint bridge at Simpson Avenue. It fairly expresses in connection with paragraph 7 that neutrality in the pending negotiations between the city and the Railway Company which Mr. Farrel says is all he wanted. Mr. Holman seems to have wanted more, but Farrell knew and Holman did not know what Baldwin had agreed to respecting this bridge. The objection was captious. The request to strike out the modification of the unlimited obligation proposed by Bridges was unwarranted.

We concede that the Lumber Company had no right to limit the scope of its obligation ascertained by the aid of all that took place showing the nature of franchises contemplated, but we contend that the Lumber Company had the right to qualify the attempted enlargement of its obligation so that the formal document should conform to the intension of the parties when the memorandum contract was made. The parol evidence clearly shows it was never the intention of the Lumber Company to aid the Railway Company to procure franchises which



would close this river crossing to highway traffic.

The District Court held, apparently, that the evidence showing the bridge plans contemplated which involves the scope of the franchises required to carry out those plans was incompetent on the ground that such evidence is within the statute of frauds and also in conflict with the general rule that parol evidence will not be received to vary the terms of a written instrument. This was the primary error of the District Court.

The Statute of Frauds has no bearing upon the competency of this testimony. The written memorandum in connection with the letter proposition to which it refers, fulfills every requirement of the statute. The franchise co-operation clause is an incidental promise to be performed after the consummation of the sale. This promise is at best of one of the considerations which induced the purchase.

Courts have uniformly held that the amount, scope and character of the consideration of a deed or other instrument may be shown by parol.

*Windsor vs. Great Northern Ry.*

37 Wash. 156. In this case the plaintiff, Windsor, had sold to the Railway Company a strip of land for right of way purposes, and had made an ordinary deed therefor. The suit was to recover damages for failure of the Railway Company to fence the right of

way which it had agreed orally to do as part of the transaction. The court allowed the agreement to fence to be proved by parol and on appeal the Supreme Court held that the evidence was properly admitted. In the opinion it is said:

“It is well established that oral testimony may be introduced to show consideration additional to that expressed in the contract.”

citing *Kickland vs Menesha Woodenware Co.*, 68 Wis. 34, where it is said: “It seems to be well settled that it is competent to prove by parol what the real consideration agreed to be paid was and to show that the same or some part of it remains unpaid though not thereby to impeach the title conveyed by the deed;” further citing *Shepard vs. Little*, 4 Johns 210, wherein it is said: “Although you cannot, by parol, substantially vary or contradict the written contract, yet these principles are inapplicable where the time or amount of the consideration becomes a material inquiry.” The case further decides the important proposition, applicable to the case at bar, that a corporation cannot accept a part of the benefit of a transaction and deny its agents authority as to any collateral obligations which were an inducement to the transaction.

In *Rishardson vs. Travers*, 112 U. S. 423, in passing upon the admissibility of parol evidence showing consideration for a deed collateral to those

expressed in the document, Mr. Chief Justice Waite said:

“It is elemental learning that evidence may be given of a consideration not mentioned in the deed, provided it is not inconsistent with the consideration expressed in it. I Greenleaf, Evidence, 286; II Phil. Evidence, 353.”

A clear statement of the rule permitting parol evidence is made by Judge Summers in *Seely vs. Cunningham*, 81 Ohio State, 219:

“That the consideration clause in a deed of conveyance is conclusive for the purpose of giving effect to the operative words of the deed, creating a right or extinguishing a title, but that for every other purpose it is open to explanation by parol proof, and is prima facie evidence only of the amount, kind and receipt of the consideration is settled by the almost unbroken current of American decisions.”

The able review of authorities which follows this quotation sustains beyond question the rule stated by the learned judge. The annotator of this case in 25 L. R. A. (n. s.) 1195, exhaustively digests the cases.

The court below in the case at bar construed, without considering the parol testimony, the words “you shall give us your co-operation in procuring \* \* \* franchises in Hoquiam”, as equivalent to the words used in subdivision 7 of the contract prepared by the Railway Company, to-wit: “such franchises as the Railway Company shall desire in



Hoquiam.” It certainly was not the intention of the parties to co-operate in procuring every kind and character of franchise on any subject which might possibly be placed before the City Council. The evidence tends to show the scope of the subject matter in the minds of the parties, and in this respect is like the contract in the case of *Donner vs. Alford*, 136 Fed. 750, where evidence was admitted and the case, being one triable before a jury, submitted to the jury covering the “question as to what a written contract on its face and in its terms actually covers and as to what subject matter it applies.”

The franchises contemplated were such as would cover the plans of construction contemplated when the memorandum was made. What were those plans? The memorandum does not say with reference to the bridge. The wording proposed in the Bridges draft would cover every change of plan the Company might make with every change of Engineer. The parties never so agreed. Both Farrell and Jones refute any such intention.

It is not necessary to go beyond the decisions of this court to sustain the introduction of the testimony showing the scope and character of the franchise contemplated by the parties with respect to the bridge.

*North American Transportation Co. vs. Samuels*, 146 Fed. 48.

*Lilienthal vs. Cartwright*, 175 Fed. 580.

In the North American Transportation case this court permitted the introduction of testimony affecting a written contract and summarized the legal principle in the following language:

“Upon an examination of the authorities bearing upon the legal principles applicable to this case, we find that the courts have held that where in the application of a contract to its subject matter an ambiguity or uncertainty arises, it cannot be removed by an examination of the agreement alone: parol evidence of the circumstances under which it was made and of statements made in the negotiations which preceded it may be admitted to resolve the ambiguity and to prove the intention of the parties (Kirby Mfg. Co. vs. Hinchman-Renton F. P. Co., 132 Fed. 957; Davies vs. Pierce, 39 So. 488); that it is competent to show all the transactions at the same time between the parties, only part of which is in writing (Chemical Co. vs. Moore, 61 S. C. 166; Graffam vs. Pierce, 143 Mass. 386; Sultan vs. Griebel, 118 Iowa, 78, and authorities there cited) \* \* \* ; that where a written instrument executed pursuant to a prior verbal agreement, does not express the entire agreement or understanding of the parties, it is competent to show by parol testimony what the real contract was (citing numerous cases) \* \* \* ; that parol evidence is admissible where it tends to prove an independent collateral fact about which the contract is silent (citing cases).”

We are at a loss to understand by what logic the District Judge, formed his conclusion that the parol evidence offered in the case at bar should not



be considered in view of this compelling authority so clearly applicable to the case at bar.

In *Sultan Railway & Timber Co. vs. Great Northern*, 58 Wash. 604, the contract consisted of a letter written by the defendant's traffic manager to the plaintiff's President, the first sentence of which was as follows: "Referring to the matter of hauling *your timber* from Sultan Junction to Snohomish" etc. One of the controversies in the suit involved the extent of the timber covered by the contract. In the course of the opinion it is said:

"By referring to the letter before set out it will be noticed that the writer of the letter when speaking of the timber to be hauled under the contract refers to it as 'your timber.' It is argued by the appellant that this phrase limits the timber agreed to be shipped to the timber owned by the appellant at the time the contract was entered into, which amounted to some fifty million feet, and that since that was all shipped before the alleged breach on the part of the Railway, the contract has been performed. We think, however, the evidence makes it clear that the contract to haul did not refer to timber then owned by the respondent but to such timber tributary to the junction named as the respondent should tender for shipment. This is made clear by what took place at the meetings of the parties while the contract was being negotiated. It is shown that at these meetings the entire matter was gone into; that the respondent not only made known its then holdings and its outstanding contracts of purchase, its purpose to acquire other timber properties and to continue its logging



business at this point as long as it found it profitable, or until the timber tributary should be exhausted. When, therefore, the Railway official used the term 'your timber' in setting out the contract, he must be held to have meant the timber concerning which the parties were negotiating, and not the specific quantity then owned by the respondent."

In this case objection was made to the testimony offered on the ground that the subject matter was covered by the writing.

The case at bar is clearly distinguishable from a line of cases which hold that parol proof will not be permitted to impose upon either party burdens and obligations not fairly within the scope of the written contract as understood and interpreted in the light of the circumstances surrounding its execution where the statute requires such additional obligation to be in writing. The provision for which the Lumber Company contended, fairly construed in the light of the circumstances, limited its obligations to the original understanding, but in no sense imposed any additional burden upon the Railway Company. Upon cross-examination of Mr. Jones, counsel attempted to have him say that the limitation insisted upon by him was meaningless and might just as well have been omitted. He does say in substance that it looks as if it might just as well have been omitted. This answer must be read in the light of his whole testimony and in the light of the conclusion reached between the Railway Com-

pany and the City, by the terms of which it was agreed to build a joint bridge. In view of what actually occurred afterwards, the clause insisted upon became immaterial, but in view of the suspected though secret purpose of Mr. Holman to effect a different result with the City, when the formal paper was being prepared, the provision insisted upon by Mr. Jones was very material at the time, for otherwise the Lumber Company would have been bound, under Section 7 of the proposed contract, to take a position in opposition to the City.

It is our contention that the complainant, in insisting upon the sentence appended to the contract, called the "Bridge Clause," insisted only upon that which by the contemporaneous interpretation put on the memorandum by both parties, towit neutrality and not alliance, was intended. The wording of the latter part of the sentence, "*provided the City of Hoquiam contributes its share of the cost of construction and maintenance,*" shows that the Lumber Company was not attempting to dictate to or make obligatory upon the Railway Company the building of a common user bridge. That the word *may* was not used in the sense of *shall* is negatived by the testimony. A court will never by construction substitute one word for another unless it is necessary so to do to carry out the intention of the parties.

It may be said that Jones did not explain to Bridges that he recognized the full importance of the joker in paragraph 7 of the formal contract



prepared by Bridges. Bridges apparently recognized the justice of the modification suggested to him by Jones, it matters nothing who did the writing. Subsequently when he heard from Holman and Farrell he did not attempt to secure any modification of the language of both sections so as to express more clearly the agreement, but contented himself with presenting Farrell's request to cut out this last sentence. If it had complied the Lumber Company would have been tied hand and foot.

The request was not based upon the ground that the contract as signed did not express the agreement made through Baldwin. What they asked was a change of that agreement.

When the Lumber Company refused to bind itself to any arbitrary request the Railway Company might make, Mr. Bridges requested that the point of disagreement remain open and that the Lumber Company forbear the execution of the formal contract by the Railway Company pending negotiations with the City Council. Such forbearance was granted, and it was the understanding of both parties, as shown by the letter of September 15th, that the original memorandum of agreement should not be affected thereby. We contend that this letter which, according to the undisputed testimony of Mr. Emerson, stated the understanding of both parties as the same was reached over the telephone, amounted to a confirmation of the original memorandum by the Railway Company and a waiver of



the point in dispute providing eventually that the City Council and Railway Company should agree upon the terms under which a joint bridge should be built. That agreement was reached in September, 1910. In the meantime the original memorandum was in full force and binding upon both parties.

The Railway Company in this litigation has attempted to belittle the letter of its Attorney and Vice-President by the claim that he was simply the attorney and officer of a subsidiary corporation, subject to the dictates of Mr. Farrell, the Vice-President and General Manager of the proprietary corporation. The record discloses Mr. Bridges' hand at every stage of this whole negotiation. He was present every time anything of importance was done, and in conjunction with the Chief Engineer, first Mr. Baldwin and then Mr. Holman, had charge of the whole negotiation. It was to him that Mr. Farrell communicated his objections to the contract signed by the Lumber Company, with the request that the objectionable sentence be cut out, and if it could not be cut out then to secure the Lumber Company's indulgence while the matter was pending in the City Council. Under those circumstances the Railway Company ought not to be heard to question Mr. Bridges' authority to protect its rights by reserving in clear and explicit language the binding effect of the memorandum agreement.

Upon this point the case of *Anderson v. Wallace Lumber Co.*, 30 Wash. 147, is instructive, as well as

the Windsor case hereinbefore referred to. In the Anderson case it is said:

“When a corporation allows certain officers to manage its business, particularly as here, such as President, Vice-President and Superintendent, it must be responsible for their acts unless it affirmatively shows that they were unauthorized.”

The record shows that Mr. Farrell was in intimate touch with what was being done at Hoquiam with reference to this terminal situation. He at one time appeared before the City Council, and he knew that the formal document which the Lumber Company had signed had not been signed by the Railway Company. He must have known in conjunction with other officers that the Lumber Company was going ahead and spending money on the assumption that the original memorandum was a binding agreement. It appears that he, as well as Mr. Holman, was personally consulted by the Lumber Company's officers about some features of the proposed construction of the tracks and the accessibility of the side-track to the new store, which could only be used in case the terminal plan was carried out. (Pp. 124, 125.)

It is our contention that the Railway Company ought to have signed the agreement executed by the Lumber Company on July 7th, which definitely fixed the date of payment as well as some incidental obligations contemplated by the original memorandum, including construction across the mill pond



and dedication of a portion of the street proposed over the property to be conveyed. The request of the Railway Company for delay in the execution of this agreement under the circumstances of the case ought not to act to the prejudice of the Lumber Company and the forfeiture of its right to have interest.

### THE DEFENSE OF TENDER.

It was contended on the trial in the District Court that on the 10th of September, 1910, after an agreement had been reached between the Railway Company and the City Committee respecting the bridge, that the Railway Company offered to comply with the requirements of the contract of June 9, 1909. The record shows that up to this time both parties had recognized the existence of a binding contract, notwithstanding the failure of the Railway Company to execute the formal contract. On the part of the Railway Company this recognition is shown by the Bridges letter of September 15, 1909, the talks between Holman and McGlaughlin, the Mill Company's Manager, and a member of the City Committee, at numerous times (pp. 124, 125), and finally the declaration of Mr. Holman to Mr. Jones that he was ready to take up the deeds. On the part of the Lumber Company it is shown that the agreement was recognized by its extensive preparation at large expense to comply and frequent conferences with officers of the Railway Company concerning the location of buildings,



spur tracks and other incidental matters.

By the terms of the original contract the price of the property, \$134,000.00, was payable twenty days after the delivery of abstracts. The record shows that these abstracts were delivered on the 12th day of June, 1909, making the date of payment about July 1st. When the formal contract was being prepared the date of payment was specifically fixed at \$20,000.00 upon the execution of the document and the balance on August 1, 1909. (Pp. 10, 16.) The formal agreement to which the Railway Company assented in all respects, except the last sentence of Paragraph 8, is conclusive evidence that a specific date for payment was reached to take the place of the time provided in the original memorandum, and that the making of deeds and payment should be concurrent acts (5th clause, p. 16).

We do not contend that the obligation to pay the price of the purchase on August 1st, 1909, arises out of the terms of the unsigned formal contract. It is based upon the original contract as modified and made specific by the subsequent oral agreement, which oral agreement is evidenced by the unsigned document in connection with the evidence that the date therein expressed was agreed to as mutually satisfactory.

There is a sharp dispute as to exactly what took place in Mr. Holman's office on September 10th when he claims that he offered to comply with the

existing contract. The dispute relates more to detail than to the essential points. Upon the essential points it appears without dispute that Holman recognized the binding effect of the contract but declined to pay any interest and declared that he would not pay any sum beyond the principal of \$134,000.00. Mr. Jones, upon the other hand, declined to accept \$134,000.00, stating that he was entitled to interest. The conflict consists in the statement of Holman and Bridges that Mr. Jones demanded \$10,000 by way of interest, and the statement of Jones that he never named any amount and wound up the controversy by asking Holman to think it over or talk it over with his superiors, or words to that effect. No computation of interest was made at that time, but the amount due was approximately \$10,000. Mr. Holman and Mr. Bridges both admit that Mr. Jones' demand was for interest, and if we assume for the sake of the argument that he said \$10,000, the slight error of a hasty mental computation should not operate to his prejudice, especially in view of Mr. Holman's positive declaration that he would not pay any interest. A fair reading of the testimony shows that the dispute was concerning the payment of interest and not the amount. Mr. Holman says that the controversy ended by his declaring the deal off; Mr. Jones says that the controversy ended by the request that he made of Mr. Holman to think it over and consider as to whether or not the Lumber Company was not entitled to interest. On this point Mr. Jones' version



is borne out by the circumstances. The store building had a short time before been commenced. The work of removing buildings from the property had been partly accomplished. Leases had been cancelled, and in general compliance with the contract was in progress. Shortly after this talk the work on the new warf required for adapting the Lumber Company's property to the new conditions was commenced. The Railway Company's local engineer was on the ground and must have seen this work going on (pp. 124-5-6). The letters written by Mr. Holman and the City Engineer the latter part of September and early in October disclose no purpose of the Railway Company to abandon the project as outlined on their map attached to the Lumber Company's contract. The Lumber Company did assume and had a right to assume that the amount to be paid according to the provisions of the contract would be settled in due time. The matter in dispute was one capable of prompt adjustment if the parties could not agree.

Is it probable that Mr. Holman during the short heated argument with Mr. Jones on the afternoon of this 10th day of September, without consultation with Mr. Farrell, who had entire ultimate charge of the property of the Railway Company, suddenly came to the conclusion to change the entire terminal plan in the important city of Hoquiam, including the location of depots, freight yards and other facilities for doing business in that city? Is it not more



probable that it was not until months afterwards when the arrangement was made with the Northern Pacific that this resourceful gentleman abandoned the contract with the Lumber Company. If it be true, as he says, that while this controversy with Mr. Jones was in progress on a moment's notice he changed the plan along which he had deliberately worked for two years, it was not fair afterwards for him to keep that purpose to himself, to mislead the Lumber Company by continuing to perfect his bridge plans and by allowing the Lumber Company to continue to spend money in preparation for the contract. This whole project had proceeded leisurely and consistently along the lines of the contract for two years. The Lumber Company had no reason to suspect any change of plans. Now the very indulgence solicited by the Railway Company and granted by the Lumber Company is set up as an equitable defense against the Lumber Company's claim.

The defense of tender is not tenable for the reason that the Railway Company through Mr. Holman did not offer to the Lumber Company the money consideration provided by the contract. The interest from the date of payment agreed upon subsequent to the original memorandum and at the time when the formal agreement was being put in shape amounted on the 10th of September, 1910, to something over nine thousand dollars. Mr. Holman definitely declined to pay any interest. It cannot

therefore be claimed that he tendered such performance of the contract as would avoid its obligation. The postponement of a formal contract did not change the date of payment agreed upon.

The Washington statute relating to interest provides:

“Every loan or forbearance of money, goods or thing in action shall bear interest at 6%,” etc.

(Rem. & Ball. Code & Stat. Sec. 6250.)

The Railway Company cannot claim a rescission of the contract without an unconditional offer to fully comply, accompanied by an unconditional offer of the money due under the contract, and thereafter a refusal by the Lumber Company to comply on its part. This offer should have been made in such a way as to have enabled the Lumber Company to accept the amount offered and sue for the difference between the amount paid and the amount claimed.

In the case of *Willard vs. Taloe*, 8 Wall. 557, specific performance was resisted on the ground that the purchaser offered to pay in notes of the United States. It was contended that the agreement contemplated payment for the property in gold. Mr. Justice Field said:

“The kind of currency which the complainant offered is only important in considering the good faith of his conduct. A party does not forfeit his right to the interposition



of a court of equity to enforce a specific performance of a contract if he seasonably and in good faith offers to comply and continues ready to comply with its stipulations on his part although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required."

This well reasoned case sustains our proposition that even if Mr. Jones may have been mistaken as to the amount due the Lumber Company, if he was ready and willing to convey, as the proof shows he was, his Company should not be subjected to a forfeiture of the contract and the loss of what it spent in preparing to perform the contract by reason of mistake.

Pomeroy's Equity Jurisprudence, Sec. 848.

*Morgan vs. Bell*, 3 Wash. 554.

"The debtor has no right to the benefit of a tender as having the effect of payment when it is burdened with such a condition that the creditor cannot accept the money without compromising his legal right to recover the further sum which he claimed to be due." *Moore vs. Norman*, 18 L. R. A. 359; 52 Minn. 83.

This statement of the court, coupled with abundant citation of authority, is the rule almost universally applied. It is founded upon the doctrine that a party who honestly believes he is entitled to a right cannot be deprived of resort to the courts for an adjudication of that right at the peril of for-



feiting that which is not in dispute.

The Lumber Company, before delivering the deeds which Mr. Holman said he was ready to take up, was entitled to a formal contract capable of record expressing the Railway Company's obligation to dedicate the street specified in the proposition of sale and also the obligation to protect the use of the log pond. While these were independent covenants to be performed after the consummation of the sale, in view of the stipulation that these covenets were to be formally executed prior to the transfer of the land, a transfer without providing for the covenets might be construed as a waiver.

The Railway Company and City had settled and the object of forbearance in the signing of a formal agreement had ceased. It was now the first duty of the Railway Company to attach its signature to the formal contract already signed by the Lumber Company. If that document was not technically in the form required by the signed memorandum, then the Railway Company should have tendered a substitute. If an agreement as to form could not have been reached, either party had a right of action against the other. This action is in effect to compel the execution of this first step under the signed memorandum, or in view of what has happened since to secure appropriate substitute relief.

The defense of laches is not available on the

ground that the Railway Company has entered into other arrangements for terminals, because it nowhere appears that the Lumber Company ever had any notice or reason to believe that the Railway Company contemplated entering into such other arrangements. On the other hand, the Railway Company should be estopped from claiming a rescision of the contract because it permitted the Lumber Company to go ahead and spend approximately \$40,000, with full knowledge that such expenditure was in pursuance of the contract and would be almost wholly wasted if the plans of the Railway Company were not carried out. The evidence shows that while these expenditures were commenced prior to the attempt to settle on September 10, 1909, they were pursued with full knowledge of the Railway Company for many months thereafter.

#### HARDSHIP OF THE REMEDY SOUGHT.

The three defendants, Grays Harbor & Puget Sound Railway Company, Oregon & Washington Railroad Company, and Oregon-Washington Railroad & Navigation Company, are bound by the covenants with each other, shown by the respective deeds of transfer, to the obligations of this contract. It was argued in the court below that the remedy of specific performance would under the circumstances of the case impose upon the defendants such hardship that a court of equity ought not to grant the relief. Judge Rudkin in passing upon the demurrer to the complaint intimated that he would



hesitate to enter a decree to the full extent of the prayer of the bill. He nevertheless overruled the demurrer in which order it appears that he considered the complainant entitled to relief.

The defense of hardship is not available to the defendants for the reason that the situation has resulted from its wrong, and is not in any respect attributable to the conduct of the complainant. If great hardship upon a party charged with the obligations of the contract were attributable to the party seeking performance or to circumstances over which the obligated party had no control, the case would be different. We know of no case where the court has declined specific performance on the ground of hardship where the contract has been abandoned by the party obligated simply because some other arrangement became more advantageous, and this is especially true where performance does not involve anything beyond the payment of the money consideration promised by the contract. If it involved a continued hardship, the case would be different.

Frye on Specific Performance, Sec. 258.

*Storer vs. Great Western Railway*, 2 Young & Collier Chancery Reports, 48.

*Pembroke vs. Thorpe*, 3 Swanstons'c Chancery Rep. 482.

*Hawkes vs. Eastern Counties Ry.*, 22 Chancellor's Rep. 739.



Where the remedy of specific performance can be accomplished by the payment of money, the decree will so provide.

*Taylor vs. Insurance Co.*, 9 Howard, 390, 405.

*Eames vs. Insurance Co.*, 94 U. S. 621.

Specific performance will be granted at the suit of either party to a real estate contract.

“The right of the vendor to go into a court of equity and enforce specific performance is unquestionable. Such subjects are within the settled and common jurisdiction of the court. It is equally well settled that if the jurisdiction attached, the court will go on to do complete justice although in its progress it may decree on a matter which was recognizable at law.”

*Cathcart vs. Robinson*, 5 Peters, 277.

The defendants ought not to be heard to plead hardship as a defense to the complainant's suit of specific performance without an offer on their part to do equity, which would involve restoration to the Lumber Company of what it has lost through the breach of the contract. If a contract existed and was terminated by the Railway Company because it found an opportunity to make a more advantageous arrangement, common justice would seem to suggest restoration to the Lumber Company of what it has lost. The court having jurisdiction over the subject matter which is cogniz-

able in equity has jurisdiction to determine and grant relief according to the circumstances of the case, under Equity Rule No. 23. This action was maintainable as a suit in equity upon the refusal of the Railway Company to sign the formal agreement which it agreed to execute. The obligation flowing out of the original memorandum of June 9th running from each party against the other existed as soon as that memorandum was signed, and immediately upon its breach by either party an action for performance arose at the suit of the other. Any controversy as to the scope of that agreement would have been settled if suit had been brought at that time, and it is now within the jurisdiction of this Court to settle the dispute at this time. Both parties held fast to the terms of the memorandum, notwithstanding postponement, through the expectation that the controverted point would become immaterial. The controverted point did become immaterial and the cause of action which arose upon the refusal of the Railway Company to sign the agreement remained in existence and became the basis of this suit. If the Lumber Company arbitrarily insisted upon a formal contract to which it was not entitled, we concede that equity ought not to help it now unless the Railway Company waived its technical rights and acceded to the claim of the Lumber Company, which would amount to a modification *pro tanta* of the original memorandum. If therefore the Lumber Company was right in the original dispute about the terms of



the formal agreement, it is entitled to a decree. If the provision inserted by the Lumber Company was to qualify a provision inserted by the Railway in the formal contract so that the two together would express the scope of the original memorandum as the parties understood it when the memorandum was made, then we are entitled to a decree. If an honest dispute existed between the parties as to the interpretation of the original memorandum in the light of the circumstances under which it was executed, or as to the language used in the formal agreement to express that understanding, and if by subsequent agreement the settlement of that dispute was postponed until negotiations between the Railway and the City might determine whether the dispute was material or otherwise, then when the dispute became immaterial through the adjustment with the City, the Lumber Company was entitled to have the contract signed carrying out in all respects the agreements and stipulations of the original memorandum.

There is a broad distinction between a negotiation looking forward to an agreement which is never consummated and a dispute over the scope and meaning of an agreement which has been reached. A dispute about the construction of an agreement or the scope of its terms may be the subject of litigation having for its object the determination of the rights of the respective parties under the agreement. The court in that case will determine



the fact as to what the agreement is and the decree will construe and determine disputed points. Where a matter has not passed beyond the stage of negotiation and where no enforceable agreement has been reached, the Court will not attempt to make an agreement for the parties and the suit will be dismissed. Or where an agreement has been reached and when the parties come to carry it out they abandon the agreement reached and try to make a new one, the case stands just where it would have stood had no agreement ever existed. The case quoted from by the District Court illustrates the point.

The court below seems to have lost sight of this distinction. Here a valid, enforceable agreement existed between the parties. Either party had the right to move against the other. The existence of a dispute as to the scope of the subject matter or the construction of the terms of the writing was no defense against the power of the court to determine what the parties had agreed upon and to enforce their agreement. Mere postponement of the time of settling a dispute arising out of an agreement will not change any right existing under the agreement.

B. S. GROSSCUP and  
W. C. MORROW,  
Attorneys for Appellant



No. 2423.

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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NORTHWESTERN LUMBER COMPANY,  
Appellant,

vs.

GRAYS HARBOR & PUGET SOUND RAIL-  
WAY COMPANY, OREGON & WASHING-  
TON RAILROAD COMPANY, OREGON-  
WASHINGTON RAILROAD & NAVIGA-  
TION COMPANY, and CHICAGO, MIL-  
WAUKEE & PUGET SOUND RAILWAY  
COMPANY,

Appellees.

No. 2423.

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Upon Appeal from the United States District Court  
for the Western District of Washington  
Southern Division

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## BRIEF FOR APPELLEES

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W. H. BOGLE,  
CARROLL B. GRAVES,  
F. T. MERRITT,  
LAWRENCE BOGLE,  
*Solicitors for Appellees.*

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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NORTHWESTERN LUMBER COMPANY, a  
corporation, Appellant,

vs.

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WAY COMPANY, a corporation, OREGON  
& WASHINGTON RAILROAD COMPANY, a  
corporation, OREGON-WASHINGTON RAIL-  
ROAD & NAVIGATION COMPANY, a cor-  
poration, and CHICAGO, MILWAUKEE &  
PUGET SOUND RAILWAY COMPANY, a  
corporation, Appellees.

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Upon Appeal from the United States District Court  
for the Western District of Washington  
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## BRIEF FOR APPELLEES

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### STATEMENT

The appellant, complainant below, brought this action against the appellees for specific performance of an alleged contract for the sale of certain real estate by appellant to Grays Harbor & Puget Sound Railway Company. The complainant owned a large body of land in the city of Hoquiam. Grays Harbor

& Puget Sound Railway Company was constructing a railroad from a point near Centralia, in the state of Washington, through the city of Aberdeen and into Hoquiam. That company found that it was impracticable to acquire a right of way for a railroad from Aberdeen across the river into Hoquiam without crossing some of the lands owned by complainant. In the summer of 1908 the Railroad Company, acting through Mr. H. F. Baldwin, its then chief engineer, opened negotiations with complainant for a right of way over its lands. All negotiations, while conducted directly by the chief engineer of the Railroad Company, were subject to the approval of Mr. J. D. Farrell, the vice-president of the O. & W. R. R. Co., which fact was clearly understood by all parties. (Transcript pp. 158, 92.) On September 25, 1908, complainant submitted to Mr. Baldwin a proposal to sell to the Railroad Company the right of way for its road along either of four alternative routes called "Railroad Avenue Line," "River Avenue Line," "Simpson Avenue Line," and "Emerson's Proposition." This proposal from complainant is found on pages 5 and 6 of the Transcript. The Railroad Company desired the line designated as the "Emerson Proposition" and, through its attorney at Aberdeen, Mr. J. B. Bridges, endeavored to induce complainant to

reduce the price named in its written proposition, to-wit: \$134,000 (Transcript, pp. 142, 143); but complainant refused to make any abatement in the price. On June 9, 1909, Mr. Baldwin and Mr. Bridges, representing the Railroad Company, met with Mr. C. H. Jones and Mr. George H. Emerson, the president and vice-president of the Lumber Company, and reached a tentative agreement, which was reduced to writing and executed by the parties, and which is as follows:

“June 9th, 1909.

Northwestern Lumber Company,  
Hoquiam, Wash.

Gentlemen:

We beg to advise you that we accept what is called (6) the ‘Emerson’ proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for One Hundred and Thirty-four Thousand (\$134,000) Dollars.

We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers.

However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.

You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid



sum. All buildings to be removed by you within six months from date of deed.

THE GRAYS HARBOR & PUGET SOUND RY. Co.

By H. F. Baldwin.

We accept the foregoing proposition.

THE NORTHWESTERN LUMBER COMPANY.

By C. H. Jones,  
Pres't."

Abstracts of title were subsequently furnished by complainant to Mr. Bridges, and the title was found to be substantially satisfactory. Mr. H. F. Baldwin died on June 16th, 1909, and Mr. J. R. Holman succeeded him as chief engineer of the Railway Company, taking charge of the office early in July. In the meantime, Mr. Bridges, on behalf of the Railroad Company, and Mr. Emerson, on behalf of the Lumber Company, met in Mr. Emerson's office during the latter part of June, 1909, for the purpose of drafting the formal agreement called for by the second clause of the letter and acceptance of June 9th. This agreement was dictated by Mr. Bridges, in the presence of Mr. Emerson and with Mr. Emerson's assistance, to Mr. Emerson's stenographer, who was to transcribe it and furnish Mr. Bridges with a copy to be sent to the officers of the Railway Company for approval or disapproval. (Transcript, pp. 92 and 143.) After this agreement as dictated by Mr. Bridges and Mr. Emerson was transcribed, no copy was sent to Mr. Bridges.

The exact order of the negotiations between the parties following the preparation of this draft of the proposed formal agreement by Mr. Bridges and Mr. Emerson, is involved in some contradiction, but all parties are agreed that Mr. Jones, on behalf of the complainant Company, refused to accept the agreement as drawn by Bridges and Emerson, and he and Emerson made a new draft containing certain material additions and changes. The Bridges draft provided for payment of the purchase price upon the execution and delivery of deeds of conveyance in accordance with the terms of the letter of June 9th. The draft prepared and signed by Jones provided for a payment of \$20,000 cash upon the execution of the agreement, and the remainder of the purchase price upon the execution of the deed. Jones also added a clause, number 8, reading as follows:

“8th. It is stipulated by the first party that the construction of the approach to the proposed bridge on the extension of Simpson Avenue shall be so arranged as to interfere with the handling of logs in their mill pond the least possible and with that object in view that an ample span shall be placed west of the west pier of the draw-bridge and that the bridge abutment be placed as nearly as possible, consistent with the economical spacing of the spans of said bridge and in accordance with the requirements of the U. S. Government, about thirty feet into the river from the line of the piles of the first party's pond,

as such piles are now driven. It is also further stipulated by the first party that such bridge may be a joint user bridge with the city of Hoquiam, provided the city of Hoquiam contributes its share of cost of construction and maintenance." (Transcript, p. 17.)

This so-called Jones draft was executed by complainant and forwarded direct to the Railroad Company's office in Seattle for execution by the Railroad Company. The Railroad Company refused to execute this agreement, making specific objection to the provision, in Clause 8 added by Mr. Jones, calling for a joint user bridge with the City of Hoquiam, and returned the draft to Mr. Bridges with instructions to see complainant and have that clause eliminated. Complainant refused to consent to its elimination, and as the Railroad Company refused to execute the agreement with that clause included, negotiations were brought to a standstill. When Mr. Bridges found that complainant would not consent to an elimination of the so-called bridge clause he arranged with Mr. Jones and Mr. Emerson that the negotiations between complainant and the Railway Company should be held in abeyance while the Railway Company took up the matter of the bridge at Simpson Avenue with the City of Hoquiam in an endeavor to work out with the city a plan that would be satisfactory to all parties. When these negotiations were taken up with Mr. Hoquiam a



citizens' committee appeared, with Mr. Emerson as its chairman, acting in conjunction with the city on these negotiations. Finally, during the summer of 1910 an agreement was reached between the Railroad Company and the city by which it was arranged that the Railroad Company would construct its own bridge, and the city, at such time as it might desire in the future, would construct a separate highway bridge adjoining the railway bridge and utilizing certain of the piers of the railroad bridge so far as practicable. This agreement was reduced to writing and signed by the Railroad Company and the city authorities on September 10, 1910. Immediately upon the consummation of this arrangement with the city, and on the same day, Mr. Holman, representing the Railroad Company, telephoned Mr. Jones that the Railroad Company had arranged the matter in dispute with the city and was now ready to consummate the agreement with complainant. Mr. Jones thereupon came to Seattle immediately and met Mr. Holman together with Mr. Bridges in the former's office in Seattle. There is some discrepancy in the testimony of Mr. Jones, on the one part, and Mr. Holman and Mr. Bridges, on the other, as to what transpired at this conference. They all agree, however, that Mr. Holman stated to Mr. Jones that the Railroad Company had adjusted the bridge

matter with the city, and as that was the only matter unsettled between the Railroad and the Lumber Company he was prepared to consummate the purchase of the right of way in accordance with the terms of the letter of June 9, 1909, and was ready to pay over the \$134,000 in cash upon delivery of deeds by the Lumber Company; that Mr. Jones refused to accept \$134,000, and stated that the Railroad could not acquire the property for less than \$144,000, and that Mr. Holman thereupon stated that the Railroad Company would not pay any sum in excess of \$134,000, the price agreed upon in the June agreement, and that if the Lumber Company insisted upon any sum in excess of that amount he would call the deal off; and that Mr. Jones declined to accept \$134,000. No further negotiations were ever had between the parties after this meeting of September 10, 1910. The Railroad Company early in May, 1911, consummated an arrangement with the Northern Pacific Railroad Company for the use of its tracks and depot facilities into Hoquiam. Immediately upon public announcement of this arrangement being made complainant prepared deeds to the property covered by the letter of acceptance of June 9, 1909, expressing a consideration of \$134,000, and made tender thereof to the Railroad Company, and demanded payment of the purchase

price. The Railroad Company rejected the tender and this action was soon thereafter commenced.

## ARGUMENT.

The very clear, full and convincing discussion of the testimony and of the legal principles involved, in the opinion of the District Judge, found in the transcript and commencing on page 60, makes it unnecessary for us to enter into as elaborate a discussion as might otherwise be desirable. The conclusions of fact reached by the District Judge should be accepted by this court as conclusive, not only because of the weight usually given to findings of the lower court in equity cases, but for the further reason that the District Judge had the benefit of the complete testimony of all of the witnesses, whereas this court has only an abstract thereof.

### I.

This being a bill for specific performance of a contract to sell real estate, and there being no allegation nor proof of part performance to take the case out of the statute of frauds, the contract to be enforced must be in writing. *Swash vs. Sharpstein*, 14 Wash. 426.

The first question in the case, therefore, is, Was there a complete written contract between the



parties? Both Judge Rudkin, in his memorandum opinion on demurrer to the complaint, and Judge Cushman in his opinion on the merits, held that the letter of Baldwin of June 9, 1909, with the written acceptance of the complainant of the same date, in connection with the allegations of the bill, standing alone, would *prima facie* constitute a valid written agreement between the parties. We do not question the correctness of this proposition. The letter of June 9th, however, provides that "a formal agreement shall be entered into pending actual transfers." The evidence shows that soon after the execution of the tentative agreement of June 9th, Mr. Bridges, the attorney for the Railroad Company, and Mr. Emerson, the vice-president and general manager of complainant, met together for the express purpose of carrying out that clause in the letter, and drafted a formal agreement, embodying all of the terms contained in the Baldwin letter, somewhat elaborated, and with many minor details agreed upon by the parties, and this formal draft was left with the complainant for execution. The complainant refused to execute it, but instead drafted a new agreement, changing the terms of the payment to the disadvantage of the Railroad Company, and adding an entirely new clause, numbered paragraph 8th, containing what is referred to in the

evidence as the bridge clause. There is admittedly nothing in the Baldwin letter of June 9th that warrants the complainant in seeking to bind the Railroad Company to either a cash part payment on the execution of the formal agreement, or to impose an obligation to construct a joint user bridge in connection with the city. The Railroad Company refused to consent to this clause, and the complainant refused to execute any formal agreement that did not contain this clause. In other words, the complainant persistently and continuously refused to execute a "formal agreement," as stipulated in the Baldwin letter, obligating it to convey these lands, unless the Railroad Company would bind itself by written agreement to the terms of the bridge clause, and the Railroad Company persistently refused to so obligate itself. It is unquestionable that the memorandum agreement or letter of June 9th contemplated that a more formal agreement should be entered into between the parties. That was one of the stipulations of the agreement. Doubtless there were many minor details which had not been fully worked out between the parties at the time of the tentative agreement of June 9th, and which both parties considered to be of such importance that they should be finally settled and agreed upon before complainant should be conclusively obligated

to sell, or defendant to purchase the property in question. Evidently, the complainant did not consider itself obligated by the Baldwin memorandum to sell this property on the terms expressed in that memorandum, because immediately afterwards it refused to carry out the first stipulation in that memorandum, to-wit, the execution of the formal agreement, unless the formal agreement changed the terms of payment and included the so-called bridge clause, which is clearly an addition to the terms as expressed in the Baldwin memorandum. The record brings this case squarely within the decision in *Hite & Raffeto vs. Savannah Electric Co.*, 164 Fed. 944. This case is referred to and quoted in the opinion of Judge Cushman in the record, and we think is squarely on all fours with the case at bar.

The complainant, as we now understand its position, is seeking to enforce the alleged contract of June 9, 1909, known as the Baldwin letter. It is admitted in its brief, and is abundantly shown by the evidence, that the complainant at all times refused to recognize this memorandum as embodying all of the essential terms of the understanding between them, and insisted upon imposing covenants and obligations upon the Railroad Company additional to those contained in that memorandum. That



the Baldwin memorandum was not considered by complainant a complete contract in itself is shown, not only by the clause therein that a formal contract should be entered into, pending actual transfers, and by the fact that complainant put forth new conditions and demands favorable to itself as part of the agreement—notably the \$20,000 cash payment and the onerous bridge clause—but by the further fact that Mr. Emerson testified that he expressly notified Mr. Bridges that complainant “held in abeyance” the obligation of the June agreement to cooperate in getting franchises until the signing of the formal agreement. He was asked this question:

“Q. A memorandum signed June 9, 1909, contains this clause: ‘However, we shall expect and you shall give us your cooperation in procuring other properties in Hoquiam and also franchises in Hoquiam.’ Had you had any request in pursuance to that request from the officers of the Railroad?

A. No. In conversation with Mr. Bridges we told him we held those things in abeyance until the signing of his contract.

Q. What things were held in abeyance?

A. The procuring of rights of way and franchises.

Q. Until the signing of what contract?

A. The contract for right of way through the Northwestern Lumber Company’s property.”

(Transcript, p. 88.)

This testimony shows that complainant did not consider itself bound by any of the provisions of the Baldwin memorandum of June 9th until the terms of the contemplated formal agreement should be settled and executed. The conclusion of the trial court that the minds of the parties never met upon all of the points under negotiation, and that no agreement was finally reached, is abundantly sustained by the record.

## II.

It is argued by complainant's solicitors that although the so-called bridge clause was not included in the contract or memorandum of June 9th, 1909, it was a part of a preceding verbal understanding between the complainant and Mr. Balwin, and that it was therefore proper for the complainant to insist upon its insertion in the formal agreement as a part of the contract between them. As we have stated before, this being a bill to enforce a specific performance of a contract to convey real estate, the contract must be in writing. This means that the entire contract must be in writing. The writing must contain all of the essential terms and conditions between the parties. If, as complainant now insists, the bridge clause was part of the original oral agreement or understanding between the parties, and one of its conditions, and therefore the

complainant was justified in refusing to execute a formal agreement which did not embody that stipulation and condition, it necessarily follows that the entire agreement between the parties was not in writing, and therefore cannot be specifically enforced in equity. The court cannot enforce performance of a written agreement modified or enlarged by prior verbal agreements, because to do so would violate the statute of frauds. No agreement to sell or purchase real estate can be enforced (in the absence of part performance, which is not claimed in this case) unless the agreement is in writing.

*Swash vs. Sharpstein*, 14 Wash. 426, 435.

*Brown on Statute of Frauds*, 376 *et seq.*

*Reid vs. Diamond Plate Glass Co.*, 85 Fed. 193.

*Williams vs. Morris*, 95 U. S. 444.

*3 Jones on Evidence*, Sec. 429.

If the memorandum of June 9th was a completed contract, and not merely one step in the negotiations then pending and which subsequently failed of consummation, it seems quite clear to us that that contract cannot be varied, altered or added to by proof of previous verbal negotiations or previous oral agreements. The general rule on this subject is, of course, not disputed. Parol testimony is



admissible to show the situation of the parties and of the subject matter so as to enable the court intelligently to construe the contract, as expressed in the writing, in accordance with the intention of the parties.

*DeWitt vs. Berry*, 134 U. S. 306;

*The Cayuga*, 50 Fed. 483;

*Reid vs. Diamond, etc., Co.*, 85 Fed. 196;

*Bank vs. Ins. Co.*, 71 Fed. 476.

It is argued by appellant, however, that inasmuch as the memorandum agreement of June 9th obligated the appellant to co-operate with the Railroad Company in procuring its franchises in the City of Hoquiam, this bridge clause was intended to qualify or explain that obligation, and in that connection it is earnestly argued in appellant's brief that the obligation of complainant to assist the Railroad Company in procuring franchises as expressed in the June 9th memorandum was broadened and enlarged by the language used by Bridges and Emerson in their draft of the formal agreement, and that the bridge clause was added by Jones for the purpose of restricting this obligation of the complainant to the particular subject matter in mind at the time the June 9th agreement was executed. The court below held against both of these contentions. The obligation, as expressed in the memorandum, reads

as follows:

“However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.”

The corresponding clause, as drafted in the formal agreement by Bridges and Emerson, provided that complainant “will co-operate with the said second party in procuring such franchises in the City of Hoquiam as it may desire and in securing such additional rights of way in the City of Hoquiam as the second party may desire.” It seems to us that it is futile to contend that this latter phraseology broadens the obligation of the complainant as expressed in the June 9th memorandum. Appellant’s contention, as we understand it, is that the phraseology used by Bridges and Emerson in the formal draft obligated the complainant to co-operate with the Railroad Company in procuring such franchises as the Railroad Company *might desire*, whereas the language used in the June 9th memorandum only obligated complainant to co-operate in procuring some franchises, but not all franchises it might desire. It is certainly obvious that the Railroad Company would not stipulate for the assistance of complainant in procuring franchises which the Railroad Company did not desire. A fair reading of the clause indicates that inasmuch

as complainant and its officers were influential in the community of Hoquiam and with the city council the Railroad Company stipulated for their active assistance in procuring such properties and such franchises as the Railroad Company might need or desire. If a franchise from the city was necessary to authorize the railroad to construct a bridge at the point contemplated, then the clause in the June 9th memorandum obligated the complainant to cooperate in securing it, and parol evidence tending to exclude that particular franchise from the agreement was inadmissible.

The record further shows, however, that the insertion of the bridge clause by complainant in the formal draft of the proposed agreement had no relation whatever to the franchise clause as drafted by Bridges and Emerson. If it had been intended to qualify the Bridges draft, which is clause 7 of the formal draft, the qualification would have been expressed in that connection and as a part of that clause. Instead of so expressing it, clause 8, as an independent clause, was added. The reading of this entire clause shows that it relates to the manner of construction of the railroad bridge across the Hoquiam River, and its arrangement in such manner as to be most advantageous to the complainant's property. The purpose which Mr. Jones



and Mr. Emerson had in mind in inserting this bridge clause in the draft and in insisting upon it afterwards is quite obvious. The record shows that the city at that time was not in a financial condition to build a separate highway bridge at that point, or at least that its responsible officers believed that its financial condition would not justify such an expenditure. (Transcript, pp. 151-2, 121.) A highway bridge at that point would have been of great advantage to complainant by deflecting the entire city travel across the bridge in front of complainant's store and through its property. It is evident that complainant sought by inserting this clause in the agreement to offer an inducement to the city authorities to join in constructing a highway at this point at once and to coerce the Railroad Company into assisting the city in constructing such a highway, to the great benefit of complainant's property. This bridge clause first appears in these negotiations in a letter from Mr. Emerson to Mr. Bridges under date of June 30, 1909, found on page 144 of the transcript. This was after the Bridges and Emerson draft of the formal agreement had been transcribed and had been sent to Mr. Jones at Tacoma for his consideration. In this connection, Mr. Emerson states that they had added the bridge clause, and gives various reasons therefor. The

letter contains no reference whatever to the obligation to assist the Railroad Company in procuring franchises, and shows conclusively that the bridge clause did not originate in any thought that the franchise obligation had been expressed too broadly in Bridges' draft. In the letter it is stated that complainant was anxious to build its mercantile establishment on the southwest corner of block 51, one of the considerations being this joint user bridge at Simpson Avenue, and the fact that their warehouses and wharves would otherwise have to be abandoned.

The theory advanced by appellant's solicitors in their brief that this bridge clause was not an independent covenant or burden which it had sought to fasten upon the Railroad Company, but a mere qualification of its obligation to assist the Railroad Company in procuring franchises has, therefore, no basis of fact upon which to rest. The right of the Railroad Company to construct the bridge across the river was secured by permit from the War Department. The ordinance introduced by Mr. Bridges on behalf of the Railroad Company on or about July 27, 1909, did not touch in any wise upon the character of the bridge to be constructed by the Railroad Company across the river. The character of that bridge was not a matter to be controlled or

governed by franchise from the City of Hoquiam. That there had been some talk between the city officials and the Railroad Company's officials relative to the construction of a bridge is fairly indicated in the record. At one time it was contemplated between them that the railroad bridge would have a footpath for the accommodation of foot passengers, and there was some discussion as to the feasibility of a double deck bridge. Transcript, pp. 151-2.) These were matters, however, that were under negotiation between the city and the Railroad Company as a matter of contract and not of franchise. It is also to be noted that the record discloses that complainant's officers at all times during these negotiations took the side of the city as against the Railroad Company, and their opposition to the plans of the Railroad Company was so marked that they were charged in open meeting by the railroad officials with being actuated by a selfish desire to benefit complainant's property rather than the city.

The court below found as a fact that there never was any definite understanding or agreement between the complainant and anyone representing the Railroad Company that the Railroad would accept a common user bridge with the city. It is true, Mr. Jones testifies that there was such an understanding with Mr. Baldwin, and Mr. Emerson to some



extent corroborates Mr. Jones in this statement. It is very probable that in the long negotiations pending between Baldwin and the complainant the plans of the Railroad Company for entering Hoquiam and the various plans for the development of its depot grounds and other property were from time to time discussed, and that the feasibility or possibility of a joint bridge to be constructed by the Railroad and the city may have been discussed between them. The record shows, however, that this was not a part of the matter to be contracted about between complainant and the Railroad Company, and that the Railroad Company never at any time consented or agreed that its agreement or contract with complainant should contain any restrictions whatever with respect to the character of the bridge it would construct across the river. The testimony of Mr. Jones seems to show that the matter of the bridge was discussed with Mr. Baldwin only in a general way, and was not considered as a condition of the contract between these parties. (Transcript, p. 102.) The Railroad Company as early as the summer of 1908 had been considering various lines of right of way to give it access to Hoquiam, and these various plans had been discussed with Mr. Jones and Mr. Emerson from time to time. In September, 1908, as a result of these discussions and negotia-

tions Mr. Emerson submitted to the Railroad Company a detailed written proposition covering four alternative lines of right of way across complainant's property into Hoquiam, stating prices and other details with respect to each route. Each of these alternative lines contemplated a bridge across the river at Simpson Avenue. This writing contains no suggestion whatever of any restrictions upon the Railroad Company in the construction of its bridge. These various negotiations culminated in the meeting of June 9, 1909, at which were present Mr. Baldwin, Mr. Bridges, Mr. Jones and Mr. Emerson, and the letter of acceptance of that date was then prepared and executed by both parties as expressing the points upon which they had agreed. That writing contains no bridge clause, nor any suggestion of any restriction upon the Railroad with respect to the character of its bridge. None of the witnesses claim that any such clause was even the subject of discussion at that time. Some days later Mr. Bridges and Mr. Emerson, representing both parties, met in Mr. Emerson's office, with the express purpose of expressing in a formal written agreement all matters of contract between the parties, and a draft was dictated by them for that purpose. There was nothing in that draft relating to the character of bridge to be constructed by the

Railroad Company. Mr. Bridges testified that up to that time he had never heard any suggestion of a restriction upon the Railroad to a joint user bridge with the city, although he attended most if not all of the conferences between Baldwin, Emerson and Jones. The record shows that there was considerable correspondence between the parties prior to that date, in none of which is there any suggestion that the Railroad Company was to be burdened, by this contract with complainant, by an obligation to construct a joint user bridge with the city. This bridge clause first appears in the negotiations, so far as any writing is concerned, in this letter from Mr. Emerson to Mr. Bridges of June 30 (p. 144 of the transcript), after the death of Mr. Baldwin, and Mr. Bridges testified that he never heard such a clause even suggested prior to the receipt of that letter. Mr. Baldwin, with whom Mr. Jones and Mr. Emerson claim to have had the understanding or discussion relative to a joint user bridge, died on June 16, 1909, so that his testimony has not been available. We think this record abundantly proves the fact that while it was known that the Railroad Company contemplated crossing the river at Simpson Avenue and that the city contemplated, at some time, the construction of a highway bridge at the same crossing, it was never intended by either of



these parties that the contract between them was to impose a condition upon the Railroad that it should construct a joint user bridge with the city. Such a clause was objectionable to the Railroad Company for obvious reasons, which are pointed out by the witness Holman in his testimony, and we think the court below was abundantly warranted by the evidence in finding that no such agreement was ever entered into, either verbally or otherwise, between the parties.

It is contended in appellant's brief that the bridge clause was not intended as a burden upon the Railroad Company or as imposing upon it an obligation to construct a joint user bridge, if the city desired such a bridge, but merely expressed the consent of the complainant to a joint user bridge in the event the Railroad Company and the city desired to join in its construction. Mr. Jones gives some little color to that theory in his testimony (pp. 104, 105 of the record).

We respectfully submit that the entire record, as well as the clause itself, contradicts that theory. As stated before, the letter of Mr. Emerson explaining why that clause was inserted in the draft is not consistent with the theory that it was merely intended to express complainant's assent to such an

arrangement, if desired by the Railroad and the city. In the second place, the consent of the complainant to such an arrangement was not necessary. When Simpson Avenue was extended by the city the complainant would have no control over either the city or the Railroad Company in the type of bridge to be constructed over the river on the street crossing. The conduct of the officers of complainant in insisting upon this clause in the agreement, and its persistent refusal to eliminate it when requested by the defendant, also contradicts this theory. Mr. Emerson states that while he was chairman of the citizen's committee in August, 1909, Mr. Jones was insisting upon the bridge clause in the agreement, and the committee was trying to bring harmony between the two different parties, evidently meaning between Jones, representing complainant, and the defendant Railroad Company (Transcript, p. 96).

We do not deem it necessary to notice in detail the authorities cited by complainant in its brief as warranting the attempt to inject this so-called bridge clause into the agreement or contract between the parties. They are seeking here specific performance of some contract involving a conveyance of real estate. In their complaint and in the brief, as we understand them, they insist that the memorandum of June 9th, 1909, constitutes such a con-

tract. It is perfectly manifest that an obligation or stipulation binding the Railroad Company to assent to a joint user bridge with the city does not rest upon the construction of any language in the June memorandum, but it is a plain addition thereto; and it is equally plain that it is a condition added by the complainant for its own benefit, and one upon which it insisted at all times until the negotiations were broken off. Complainant could just as consistently have refused to carry out the arrangement evidenced by the Baldwin memorandum by insisting upon any other conditions relating to the character of station buildings to be constructed, or the arrangement of tracks upon the right of way to be conveyed, or the character of service to be furnished to the complainant's industries.

### III.

After the complainant injected the bridge clause into the negotiations, and the parties found that they were unable to reach an agreement on that account, the Railroad Company endeavored by negotiations to reach an agreement with the city which would obviate this obstacle to a completion of the negotiations with the complainant. It is stated by both Mr. Bridges and Mr. Emerson that this course was pursued by the Railroad's representatives with



the acquiescence and approval of the complainant and with the understanding that the negotiations with the complainant would stand in abeyance until the Railroad Company could determine whether it was possible to reach an agreement with the city relative to the bridge. There is some contention made in appellant's brief that this was a waiver by the Railroad Company of its objections to the bridge clause. This contention is clearly untenable. The evidence shows that neither party yielded its position with respect to the bridge clause, nor intended to waive its contention. The Railroad Company, however, was desirous of acquiring this property from complainant at the price which had been agreed upon, and in good faith endeavored to reach an understanding with the city which would induce the complainant to waive this objectionable clause upon which it was insisting and enable the parties to consummate their negotiations. This was fully understood by complainant and acquiesced in by it. When these negotiations were taken up by the city with the Railroad Company a citizens' committee immediately appeared on the scene, headed by Mr. Emerson, and this committee at all times during those negotiations took the side of the city as against the Railroad Company, both as to the character of the bridge to be constructed and in the distribution

of cost as between the city and the Railroad Company, in the event a joint bridge was constructed. Ultimately the Railroad Company succeeded in working out a plan with the city officials, by which it was agreed that the Railroad Company should construct its own bridge at the Simpson Avenue crossing, leaving the city free to construct a highway bridge alongside the railway bridge whenever it desired to do so, using certain of the center piers of the Railroad bridge. This bridge clause having been the only condition in the negotiations upon which the parties had been unable to agree, and that clause becoming immaterial when this agreement was reached with the city, the defendant immediately notified Mr. Jones that it was ready to close the negotiations and consummate the purchase. Pursuant to this notice Mr. Jones met Mr. Holman and Mr. Bridges in Seattle. These witnesses do not entirely agree as to what took place at this meeting, but their differences are in the main on immaterial details. That Mr. Holman offered to close the trade by paying over to the Lumber Company the sum of \$134,000 in cash, the purchase price of the property, and accept deeds from the Company to the property, in strict conformity to the Baldwin memorandum, and that Mr. Jones refused to accept this offer and demanded \$144,000, are facts testified to by all

three parties. Mr. Jones says that he considered the additional \$10,000 as interest. Mr. Bridges says that Jones demanded a flat sum of \$144,000, although he may have used the word interest or delay in consummating the deal as his excuse for making the additional claim. Mr. Holman's recollection is that Mr. Jones demanded an additional sum of \$10,000 on account of the delay in consummating the negotiations. Mr. Jones made no objection to the proposal to consummate the negotiations at once except to the price. He demanded \$144,000 instead of \$134,000. In Mr. Jones' first testimony relative to this conference (appearing on pp. 107, 108 of the transcript) he claims that he did not mention any amount but thought they ought to have interest, and that when Mr. Holman asked how much interest, what it was on, he did not fix any amount. He states further that Holman "said he could not do anything in regard to the interest—and would have to drop the matter." Mr. Bridges' statement of what transpired at the meeting appears in the transcript (p. 153). He states that Holman offered to immediately consummate the trade by paying \$134,000 cash on execution of the deed, and Jones demanded \$144,000. The interview concluded as follows:

“Mr. Holman then said, ‘Now, Mr. Jones, we are ready to take up this deed for \$134,000



and pay you for it but we will not pay you any more.' Mr. Jones says, 'You cannot have it for less than \$144,000,' and walked out of the office. That was the end of it. Mr. Jones demanded there at the conversation the payment of \$10,000 extra or \$144,000, before the transfer would be made, and Mr. Holman expressly refused to pay it."

Mr. Holman's version of this interview (Transcript, pp. 173, 174) is that after explaining that the matter of the bridge had been adjusted with the city he told Jones that he was ready to close the matter by paying over \$134,000 in exchange for the deed, and that Jones demanded \$144,000, giving as his reason that the trade had been closed over a year previously and it was in the nature of interest; that Bridges explained to Jones that complainant had been in possession of the property all the time and that the negotiations had been held in abeyance pending the adjustment with the city, and that Jones replied, "That Makes no diffirence, that property will now cost you \$144,000." I said, "Mr. Jones, we will never consider that for a minute, we will not pay that price." Mr. Jones said, "You will either pay that price or not get the property." I said, "Well, we will not take the property at that price, I will not agree to it." Mr. Jones remarked, "Well, either you or somebody else will pay that price before you get the property," and immediately left

the room. There were never any negotiations between the parties from that date, September 10, 1910. The Railroad Company never made any further effort to acquire the property from the complainant and the complainant never made any further inquiries in regard to it. Mr. Holman immediately began working out a right of way different from that included in the negotiations with complainant, with a view to locating the depot on different property and acquiring such of complainant's property as might be necessary by condemnation. In May following, however, the defendant company made a contract with the Northern Pacific for the use of its tracks into Hoquiam and for the use of its station facilities. Immediately upon this fact becoming known complainant tendered its deeds, expressing a consideration of \$134,000, and demanded specific performance of the Baldwin memorandum of June 9, 1909.

It is admitted by all of the parties that Mr. Holman, on behalf of the Railroad Company, in this interview offered to immediately carry out the contract of purchase with complainant at the price agreed upon in the Baldwin memorandum, and that complainant refused to perform the contract unless an addition of \$10,000 was made to the purchase price. It is contended by complainant that it did

not understand the negotiations ended with this interview. It is admitted, however, by Mr. Jones that Mr. Holman stated to him distinctly that the Railroad Company would not pay anything in excess of \$134,000, and would have to drop the matter. This statement is emphasized by the testimony of both Holman and Bridges. We think the testimony of the witnesses shows conclusively that both sides understood at that time that the negotiations had failed, and this is strongly corroborated by the acts of both parties. It will be noted that Mr. Jones claims that he did not make a direct demand for either \$10,000 or interest, but merely stated that he thought they ought to have interest because of the delay in consummating the negotiations. He further admits that Mr. Holman positively refused to pay interest and said he would have to drop the matter. In view of the position which Mr. Jones claims to have taken in that interview, that is, that his company was entitled to have interest because of the long delay, and the position which he says Mr. Holman took, to-wit, that he would not pay interest but declared the deal off, it is inconceivable that complainant would have suddenly ceased all conferences or negotiations and would have made no further request or demand or inquiry of the Railroad Company from the time of that meeting,



September 10, 1910, until June of the following year after the Railroad had acquired an independent entry into Hoquiam, if the complainant, as it now claims, considered that there was an existing contract with the Railroad under which payment of the purchase price was long past due. If they were claiming interest in September, 1910, because of the delay in closing the deal, is it not unreasonable to assume that they would remain quiescent for nine months longer in the face of the knowledge that the Railroad Company was refusing to pay any interest, and make no endeavor whatever to have the matter closed? To us it is apparent that complainant believed the Railroad Company could not acquire an entry into Hoquiam without crossing its property and would ultimately be compelled to accede to its demand. This belief of complainant was based upon the known fact that the Railroad Company had a permit from the War Department for the construction of its bridge at Simpson Avenue and that the agreement of the Railroad Company with the city also located the bridge at the same point. It was impossible to construct a line to cross a bridge at Simpson Avenue without crossing the property of complainant. The line would not necessarily be the same line contemplated in the previous negotiations, but that was a matter

presumably immaterial to complainant. Feeling that the Railroad Company would be compelled, either by negotiations or condemnation, to acquire a right of way and station grounds from them, they felt perfectly safe in allowing the previous negotiations to fail, as they were confident they would ultimately get a larger sum out of the defendant. In fact, Emerson had previously stated to Bridges that his associates, presumably referring to Jones, were not satisfied with the price and that if he (Bridges) approached them with an endeavor to get the price changed the probability was that the price would be increased. It is evident from the entire record that the complainant thought that it had entire command of the situation, and that defendant would be compelled to ultimately yield to whatever demands it might put forward. The officials of the Lumber Company, as appears from the evidence in the case, were wealthy and influential men in Hoquiam, and they felt reasonably safe in assuming that any jury in condemnation proceedings would not do them any injustice in the amount of its award. Common experience justified them in that assumption.

In weighing the testimony of the witnesses as to what took place at this conference in September, 1910, as well as the testimony regarding the understanding with Baldwin as to the bridge clause, it is

proper that we should call the attention of the court to the somewhat frail memory of Mr. Jones and Mr. Emerson as to further facts which developed in the case. Both Emerson (Transcript, pp. 86 and 94) and Jones (Transcript, p. 113) state positively and repeatedly that they never knew why the Railroad Company refused to sign the formal agreement containing the bridge clause, and that they were never informed that defendant objected to that clause. On cross-examination Mr. Emerson finally admitted (Transcript, pp. 95-6) that he was in error in that statement, and that he did know that the Railroad Company had refused to sign because of the bridge clause. Mr. Jones on cross-examination made substantially the same admission (Transcript, pp. 115-6). It developed subsequently, on taking the testimony of Mr. Bridges, that he had notified the complainant in writing on July 23, 1909, that the Railroad Company refused to execute the draft of the formal agreement because it contained the so-called bridge clause. That letter is found on page 147 of the transcript. It will be noted that in this letter Mr. Bridges refers to a talk had by him with Mr. Jones on the preceding Tuesday, in which he notified Mr. Jones that the defendant would not sign the contract with the so-called bridge clause. A careful reading of the testimony of both Jones



and Emerson under cross-examination on this particular point discloses either a manifest attempt at evasion or a very deceptive memory, which should put the court upon its guard in accepting other statements made by them regarding other facts. They both testified that the bridge clause was written into the formal agreement by Mr. Bridges, and Mr. Jones stated that it was written in by Bridges in his presence by simply adding clause 8th to the draft previously made by Bridges and Emerson, without re-writing any of the document except possibly the last page (Transcript, pp. 113-4). Mr. Bridges denied this entire statement (Transcript, pp. 144 *et seq.*) He is fully corroborated and sustained by the letter from Mr. Emerson under date of June 30, 1909, wherein he stated that the bridge clause was added by him (Transcript, p. 144). The draft containing the bridge clause also differs in other respects from the draft dictated by Bridges and Emerson, notably in the fact that Jones had added a provision for a cash payment of \$20,000 on signing the agreement, which provision was not in the draft drawn by Bridges and Emerson. These discrepancies are not material in themselves, but show that the memory of Mr. Jones is not entirely reliable.

This action is to enforce specific performance of the memorandum of June 9, 1909. That memo-

randum contained three separate clauses: (a) that complainant would convey the property therein described for a consideration of \$134,000, (b) that a formal agreement should be entered into between the parties embodying the terms of the contract prior to transfer, and (c) that complainant would co-operate with the defendant in securing other properties and franchises in Hoquiam. The record clearly shows that complainant refused to execute the formal contract embodying the terms of the Baldwin memorandum, unless they could add thereto the bridge clause and change the terms of payment to their advantage. The record further shows that complainant has refused to co-operate with the defendant in securing franchises in Hoquiam, claiming that that obligation never became effective because no formal agreement had ever been executed. The record further shows that complainant refused to perform the agreement to convey the property to the defendant for a consideration of \$134,000, and refused to convey at all unless it was paid an additional sum of \$10,000. In other words, the record clearly shows that the complainant has heretofore refused to perform each of the three obligations assumed in the Baldwin memorandum. We do not understand that appellant's solicitors really insist that complainant was entitled to demand an addi-

tional \$10,000 either by way of interest or otherwise, but their contention rather is that complainant made the demand in good faith and therefore should not be deprived of its remedy of specific performance if it was mistaken in its demand. That complainant was not entitled to the additional sum demanded, either by way of interest or otherwise, is perfectly clear from the terms of the agreement. In the Baldwin memorandum the clause with respect to payment is as follows:

“You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty days after delivery of abstracts within which to examine the same, and upon our attorneys passing title and delivery by you to us of proper deeds of warranty to such property we will pay you the aforesaid sum.”

The price named, to-wit, \$134,000, was not payable until the complainant delivered to the Railroad Company proper deeds of warranty to the property. It is admitted that no such deeds were tendered prior to June, 1911. Interest could not be demanded until the Railroad Company was in default in payment, and admittedly it was not in default in September, 1910, when the \$10,000 extra was demanded, because deeds had not been delivered or tendered prior to that date. The record therefore shows that the defendant at that time offered to carry out and



consummate the trade between them and that complainant refused performance. At that time the Railroad Company had completed its negotiations with the city of Hoquiam, and was ready to construct its line into that city, having practically completed the road to Aberdeen. When the complainant refused its offer of \$134,000, and demanded an additional \$10,000, the defendant was confronted with one of three alternatives—either, first, to submit to the exaction of \$10,000 additional; or, second, delay construction of its line into Hoquiam until it could bring suit against complainant and enforce the performance of its contract (assuming there was a valid contract existing), which would have entailed a delay of ten months or more in completing the line to Hoquiam; or, third, abandon the negotiations with complainant and obtain entry into Hoquiam in some other way or over some other line. It chose the latter alternative. After the Railroad Company has elected to abandon the negotiations, because of the refusal of complainant to consummate them, and has changed its condition and acquired an independent entry into Hoquiam, so that it cannot now use the property of the complainant, the complainant cannot be permitted in a court of equity to retrace its steps and, under these changed conditions, elect to do what it refused to do in September, 1910.

The party seeking the remedy of specific performance of a contract in equity must show himself to have been at all times ready, desirous, prompt and eager to perform upon his own part. 3 *Pomeroy, Equity Jurisprudence*, section 1408. This equitable remedy will not be given where the party seeking it has been guilty of any laches, and the position of the defendant, as a consequence thereof, has so changed that the remedy against him would be harsh or oppressive.

In *Hogan vs. Kyle*, 7 Wash., 600, it is said:

“The doctrine of the court thus established is that laches on the part of the plaintiff (whether vendor or purchaser) either in executing his part of the contract or in applying to the court will debar him from relief. A party cannot call upon a court of equity for specific performance, said Lord Alvanley, M. R., unless he has shown himself ready, desirous, prompt and eager, or, to use the language of Lord Chancworth, specific performance is relief which this court will not give unless in cases where the parties seeking it come promptly as soon as the nature of the case will permit.”

It is also well settled that where a vendor once refuses to convey upon demand he cannot subsequently enforce specific performance by the vendee.

*Johnson vs. Lara*, 50 Wash. 368.

*Eveleth vs. Scribner*, 12 Maine, 24.

*S. C.*, 28 *Am. Decs.*, 147.

*Porter vs. Citizens Bank*, 73 Mo. Appeals, 513.

The complainant is here seeking to enforce specific performance of the alleged contract of June 9, 1909. Its officers admit that they refused to execute the formal agreement called for by that contract, unless there was inserted at least two additional conditions, to-wit, a covenant for the payment of \$20,000 of the consideration upon the execution of the formal agreement, contrary to the express terms of the June 9th memorandum, and, second, the insertion of the so-called bridge clause, which is admittedly not in the previous memorandum, they refused to co-operate in procuring franchises from the city, claiming that that obligation was held in abeyance, pending the execution of the formal agreement; they refused to convey the property upon the payment of \$134,000 in accordance with the June agreement. Complainant is now here in court asking the specific performance of the identical agreement which it in these three respects heretofore specifically refused to perform. Under the doctrine of the cases above cited, it is not entitled to any relief, even if it be assumed that a definite valid agreement was consummated between the parties.

The relief asked in this case at this time would not be equitable, but would be exceedingly harsh and oppressive upon the defendant. At the time of the negotiations the Railroad was seeking to acquire a



right of way and station grounds. Because of the conduct of the complainant, and its refusal to convey the property in accordance with the terms previously agreed upon, the Railroad was compelled to abandon the right of way contemplated, and has acquired entry into Hoquiam and station grounds from other parties. It could make no use whatever of the property of complainant at this time. Even if the utmost good faith could be conceded to the complainant in the demand made by it for the additional \$10,000, the fact would remain that it was not entitled to exact that sum from complainant and that its unjust demand, coupled with its failure to assert any intention to attempt to hold the complainant to the purchase of this property, resulted in forcing the defendant into making other arrangements for its road. The price named in the original memorandum, \$134,000, covered not only the value of the property which was to be conveyed but the damage to the remainder of complainant's property. Mr. Emerson specifically states that this sum included, first, the value of the property sold; second, benefits the complainant anticipated from the construction of the road, and, third, damages to complainant's other property from the operation of the road along this right of way. (Transcript, p. 89.) Two of these elements are eliminated by the fact

that the road has been constructed elsewhere. It would be manifestly inequitable to compel the defendant to pay the complainant \$134,000 as the purchase price of this property, when complainant's officers state that that sum was not the purchase price, but included the estimate of damages to the remaining property that would result from the operation of a railroad over this right of way.

#### IV.

It is suggested rather than argued in the brief that if the court finds that the remedy of specific performance should not be given, then the complainant should be allowed damages. It is, of course, well understood that a court of equity is not ordinarily the forum for the recovery of damages. It has jurisdiction to award damages in cases of specific performance only where the vendor has partially disabled himself to perform and the vendee elects to accept partial performance with an award of damages in lieu of full performance. If when the action was commenced the condition was such that complainant was not entitled to specific performance damages cannot be awarded as compensation.

*Peters vs. Van Horn*, 37 Wash. 550;

*Morgan vs. Bell*, 3 Wash. 554;

*McKinney vs. Big H. & C. Co.*, 167 Fed., 770;  
*3 Pomeroy Eq. Jur.*, sec. 1410.

Nor is it alleged in the bill of complaint, or claimed in the brief, that there is any part performance sufficient to take the case out of the statute of frauds. The complainant has remained in possession of the property, and no payment has been made by defendant. It is true, the complainant has made certain improvements on its property, and certain rearrangements of its business, which it claims it would not have made except for its expectation that defendant would construct its railroad upon the line contemplated. These expenditures by complainant were not made in performance of the contract. Under the terms of the Baldwin memorandum, the complainant agreed to remove the structures on the right of way within six months after passing the deed. The deed was never passed, and there is no evidence that any of the structures on the property included in the contemplated right of way have been removed. Even the expenditures by complainant in rearranging its business were all made subsequently to September, 1910, as shown by the testimony of both Jones and Emerson, and in any event they are not of such character as to con-



stitute performance of the contract, because they are not in any sense within the terms of the contract.

Respectfully submitted,

W. H. BOGLE,

CARROLL B. GRAVES,

F. T. MERRITT,

LAWRENCE BOGLE,

*Solicitors for Appellees.*

No. 2424

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United States  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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TACOMA RAILWAY & POWER COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

ELLING REMMEN,

Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District Court  
of the Western District of Washington,  
Southern Division.

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**Filed**

JUL 10 1914

F. D. Monckton,  
Clerk.





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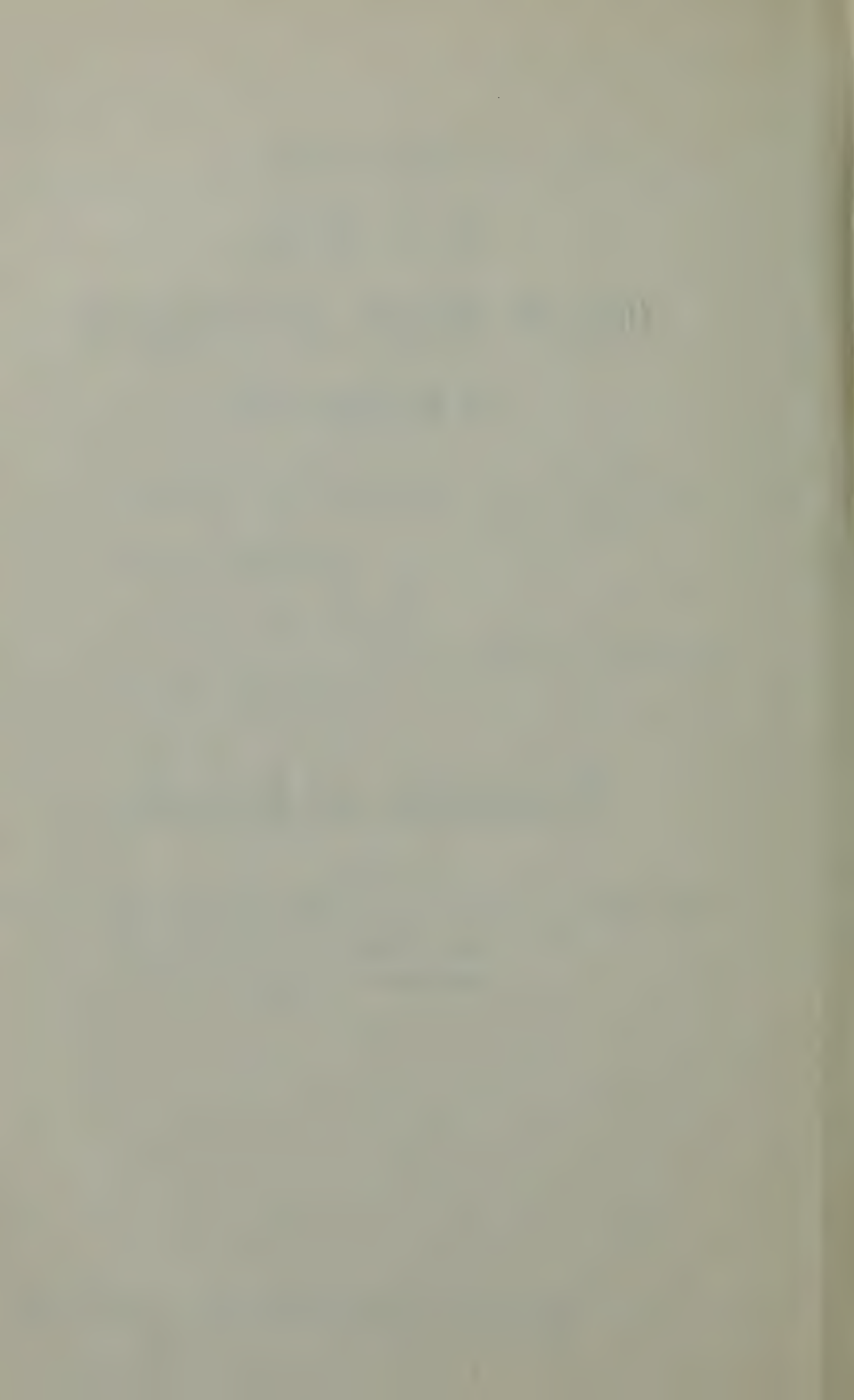
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

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B. F. JACOBS, Esquire, #406 Bankers Trust Building, Tacoma, Washington, and

J. M. ARNTSON, Esquire, #406 Bankers Trust Building, Tacoma, Washington,

Attorneys for the Defendant in Error.

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*In the District Court of the United States, Western District of Washington, Southern Division.*

No. 1335.

ELLING REMMEN,

Plaintiff,

vs.

TACOMA RAILWAY & POWER COMPANY, a Corporation,

Defendant.

**Stipulation [as to Printing of Record].**

It is hereby stipulated by the parties hereto that the Clerk of the Circuit Court of Appeals have printed the following parts only of the record which are deemed material to the hearing of the Writ of Error in this case, to wit:

Complaint;

Answer;

Reply;

Judgment;

Defendant's Requested Instructions;

Petition for New Trial;

Order Overruling Petition for New Trial;

Assignments of Error;

Bill of Exceptions;

Order Settling Bill of Exceptions;

Petition for Writ of Error;

Order Allowing Writ of Error;

Bond on Writ of Error;

Citation;

Writ of Error and this Stipulation.    [1\*]

That in printing the above portions of the record, the designation of the court, title of the case, verifications, and endorsements may be omitted, except on the first page,—the Court's charge to the jury shall also be printed as part of the record, but if printed as part of the bill of exceptions that is sufficient.

FITCH, JACOBS & ARNTSON,

Attorneys for Plaintiff.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.

(Filed May 8, 1914.)    [2]

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### **Complaint.**

Comes now the plaintiff and for cause of action against the defendant, complains and alleges as follows:

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\*Page-number appearing at foot of page of original certified Record.

## I.

That the defendant is, and was at all of the times hereinafter alleged, a corporation organized under the laws of the State of New Jersey, and doing business in the Western District of Washington, and was and is engaged in the operating of a line of street railway in the City of Tacoma, and particularly a line of street railway running in a northerly and southerly direction on South Yakima Avenue in said city.

## II.

That the plaintiff is a resident of the Western District of Washington, residing in the southerly part of the city of Tacoma; and on or about December 7th, 1912, at about six P. M. of said day the plaintiff was travelling southward on said South Yakima Avenue in the City of Tacoma, and upon arriving at about South Sixty-second Street plaintiff undertook to cross from the westerly to the easterly side of said avenue, and while plaintiff was upon said South Yakima Avenue, and in the exercise of due care on his own part, and endeavoring to pass from the westerly to the easterly side thereof, one of the street-cars of the defendant, which was being carelessly and negligently operated in a northerly direction on said South Yakima Avenue, was so carelessly and negligently operated and handled by the employees of the defendant company in charge of the operation of said car that plaintiff was without warning run down, struck and injured by said car.

## III.

That by reason of being so struck and run down by said street-car [3] as in paragraph two hereof



alleged, plaintiff was seriously and permanently injured, particularly as follows: Plaintiff suffered an injury to the right leg, and particularly about the right knee joint, and a fracture of the external condyle of the femur, and the internal semilunar cartilage has been fractured and torn away from its attachments to such an extent that it is floating, and acts as a foreign body in the knee-joint, and a severe bruise and sprain of the right shoulder, and a depression of the skull on the right side of the head. By reason of which injuries plaintiff suffered great mental and physical pain and anguish, has been permanently deprived of the use of his right leg, was knocked insensible for a long period of time, and did not recover complete consciousness for a period of about ten days, plaintiff's memory has been seriously impaired by reason of the injury to his head, plaintiff's hearing has been and is seriously impaired, and plaintiff is advised and alleges the fact to be that said injuries are of a serious and permanent nature.

## IV.

That plaintiff is of the age of thirty-eight years; that plaintiff is by occupation a longshore and warehouse man, and as such was able to earn and did earn an average wage of twenty-five dollars per week.

## V.

That by reason of the injuries by plaintiff received as herein alleged, his earning capacity has been completely cut off and destroyed.

## VI.

That by reason of the injuries by plaintiff received as herein alleged, he has been damaged in the sum of ten thousand dollars (\$10,000.00). [4]

Wherefore plaintiff prays judgment against the defendant for the sum of ten thousand dollars (\$10,000.00), together with his costs and disbursements in this action sustained, to be taxed according to law.

FITCH, JACOBS & ARNTSON,  
Attorneys for Plaintiff.

(Verification.)

(Filed Apr. 28, 1913.) [5]

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**Answer.**

The defendant, for answer to the complaint of the plaintiff filed herein, alleges and says:

I.

For answer to paragraph one of said complaint, this defendant admits the same.

II.

For answer to paragraph two of said complaint this defendant admits that on or about December 7th, 1912, plaintiff undertook to cross South Yakima Avenue, and was injured by colliding with one of defendant's street-cars, but this defendant denies each and every other allegation in said paragraph contained.

III.

For answer to paragraph three of said complaint, this defendant admits that plaintiff sustained certain injuries to his leg, but this defendant denies each and every other allegation in said paragraph contained.

IV.

For answer to paragraph four of said complaint, this defendant says it has no knowledge or informa-



tion sufficient to form a belief as to the facts therein contained and therefore denies the same.

## V.

For answer to paragraph five of said complaint, this defendant denies the same and each and every allegation therein contained.

## VI.

For answer to paragraph six of said complaint, this defendant denies the same and each and every allegation [6] therein contained, and particularly denies that plaintiff has been damaged in the sum of \$10,000.00 or in any other sum whatever.

FURTHER ANSWERING, AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

## I.

That the accident hereinbefore admitted to have occurred was occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise, in that while defendant's car was being operated on South Yakima Avenue, between 64th and 63d Streets, in the City of Tacoma, at a moderate and lawful rate of speed, plaintiff heedlessly, carelessly, recklessly, and unnecessarily placed himself in a position of great danger, to wit, by walking or running across said street in close and dangerous proximity to defendant's car and striking and colliding with said car; that plaintiff failed to exercise his mental faculties in any way to observe, escape, and avoid the risks and dangers of his position, which were open and apparent to him and could have been easily avoided; that he failed to take any care



or precaution whatever to provide for his personal safety.

WHEREFORE, defendant prays that said action be dismissed and that it go hence with its costs and disbursements herein to be taxed.

J. A. SHACKLEFORD,  
F. D. OAKLEY,  
Attorneys for Defendant.

(Verification.)

(Filed May 19, 1913.) [7]

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**Reply.**

Comes now the plaintiff, Elling Remmen, and for reply to the further, separate and first affirmative defense of said defendant's answer, included in paragraph one on page two of said answer, denies the same and each and every allegation therein contained.

Wherefore plaintiff prays judgment as asked for in his complaint herein.

FITCH, JACOBS & ARNTSON,  
Attorneys for Plaintiff, 406 Bankers Trust Bldg.,  
Tacoma, Washington.

(Verification.)

(Filed May 27, 1913.) [8]

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**Judgment.**

This cause coming on regularly for trial in open court on the 11th day of November, 1913, before Honorable Edward E. Cushman, Judge, and a jury, and the evidence having been introduced on behalf of the plaintiff as well as on behalf of the defendant,

and the jury having been instructed in the law applicable to the case by the Court, and after argument of the respective attorneys for the plaintiff and for the defendant, and the trial of said cause having been concluded on the 12th day of November, 1913, the jury retired in charge of the bailiffs of said court to deliberate of their verdict, prior to the retiring of which jury it was stipulated and agreed in open court by the respective attorneys for plaintiff and defendant that said jury might, upon agreeing, seal their verdict and return the same into court upon the convening of the court the following day, and upon the 13th day of November at ten o'clock of said day, court having reconvened, said jury returned into court with a verdict in favor of the plaintiff and against the defendant and assessed the damages of the plaintiff at the sum of four thousand seven hundred and fifty dollars (\$4750.00), which verdict was, by the Court, read to the jury, and said jury was then and there, by the Court, inquired of "Gentlemen of the jury, is this your verdict?" to which they one and all responded in the affirmative, whereupon said verdict was by the Court received and filed, and said jury discharged from further consideration of said cause.

Wherefore, it is by the Court considered, adjudged and decreed that the plaintiff do have and recover judgment against the defendant, Tacoma Railway & Power Company, a [9] corporation, for the sum of four thousand seven hundred and fifty dollars (\$4,750.00), together with his costs in this action sustained, to be taxed according to law and the practise of this court.

Done in open court this 13th day of November,  
1913.

EDWARD E. CUSHMAN,  
Judge.

(Filed Nov. 13, 1913.) [10]

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**Defendant's Requested Instructions.**

Comes now the defendant at the close of all the testimony and moves the Court to direct the jury to find a verdict in favor of the defendant.

In the event that the Court refuses to give the above request for a directed verdict, the defendant, without waiving said request, moves the Court that the following instructions be given to the jury:

I.

I instruct you that the law presumes nothing in favor of the plaintiff or of his allegations in the complaint, and the burden of proof is on him at all times to establish affirmatively his allegations of negligence against the defendant company. He must prove this by the fair preponderance of the evidence. The fact that an accident may have occurred to him and that he may have sustained injury while crossing the defendant company's street-car tracks at about South 62d and South Yakima Avenue, in the City of Tacoma, on the day in question, raises no presumption of liability against the defendant company. The plaintiff must prove first by the fair preponderance of the evidence that the defendant company's car was being carelessly and negligently operated on South Yakima Avenue, and that no warning was given when the car ran down and injured



plaintiff, and if you find from the evidence on this point that the evidence for the plaintiff and the evidence for the defendant is evenly balanced in your minds, then your verdict must be for the defendant company, because the plaintiff has failed in his proof. [11]

The plaintiff must follow this first proof with other proof, and must likewise establish by the fair preponderance of the evidence that the injuries from which he suffered were the direct and proximate result of the negligence of the defendant as set forth in the complaint, and again if the evidence on this point is evenly balanced both for and against the plaintiff, your verdict must be for the defendant because the plaintiff has again failed in his proof.

## II.

The defendant charges that this accident was the result of the carelessness and negligence of the plaintiff himself, in that while defendant's car was being operated on South Yakima Avenue between South 64th and South 63d Streets, at a moderate and lawful rate of speed, plaintiff heedlessly, recklessly, carelessly and unnecessarily placed himself in a position of great danger, to wit, by walking or running across said street in close and dangerous proximity to defendant's car and striking and colliding with said car, and that he failed to exercise his mental faculties in any way to observe, escape, and avoid the risks and dangers of his position, which were open and apparent to him and could have been easily avoided, and that he failed to take any care

or precaution whatever to provide for his personal safety.

I charge you that the rights of a street-car company and the rights of a pedestrian upon the street are mutual and concurrent, and that they must each be exercised with reference to the use of the street by the other. Neither one has the monopoly of the use of the public street, but the law holds that because of the weight and character [12] of a street-car in that it travels on fixed rails and cannot be stopped or turned out of the way as a wagon or pedestrian can, that it is the duty of a pedestrian to consider this fact in crossing the street. It is the pedestrian's duty before stepping upon the car track to make reasonable use of his senses for his own safety to ascertain whether or not a car is approaching, and to look and to listen for the possible approach of a car, particularly at a place where he knows from experience or observation that the cars are likely to be running. If he fails to look or to listen before stepping in dangerous proximity to a street-car track, or if he looks and does not see or does not heed what he does see, then he is guilty of contributory negligence, and the law has said that the plaintiff who is guilty of contributory negligence cannot recover. If you find that the plaintiff was negligent in failing to look or to listen before stepping upon the street-car tracks and that if he had looked or listened he could have seen or heard the car in time to have avoided the accident, then he is guilty of contributory negligence and your verdict must be for the defendant.



## III.

I instruct you that if you find from the evidence that both the plaintiff and the motorman in charge of the street-car were negligent, and that as a result of such joint or concurring negligence, that is, the negligence of both parties concurrently contributing to the injury, the accident occurred, your verdict should be for the defendant. The law in a case of this kind does not consider the degree of negligence of the respective parties. If the defendant was guilty of negligence and if at the same time [13] the plaintiff's negligence also contributed to the injury, your verdict must be for the defendant, regardless of the degree or extent of the negligence of the respective parties. Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover and your verdict must be for the defendant.

## IV.

A motorman or employee in charge of a street-car has a right to presume, in the absence of distinct evidence to the contrary, that a man walking across the street, crossing the street-car tracks ahead of him, will not willfully or unnecessarily place himself in a place of danger. In the absence of evidence to the contrary, he has a right to presume that the pedestrian is in the exercise of his faculties and that he will stop or turn aside before he steps into a position of danger. The failure of the motorman to



blow the whistle or ring the bell, if you find that there was such a failure, or the fact that the car was traveling at an excessive rate of speed, if you find that this was the case, would not relieve the plaintiff from the necessity of taking proper precaution for his personal safety. Negligence on the part of the company's employees in these particulars is no excuse for negligence on the part of the plaintiff; he was bound to look or listen or to otherwise inform himself of the possible approach of a street-car, and if you find that he failed to exercise his faculties to avoid the accident, or if he did see the car [14] coming and instead of stepping aside, or waiting for it to pass, undertook to cross in front of it, then the accident was the result of his own mistake, and error in judgment, and the defendant cannot be held liable.

Ry. Co. vs. Houston, 95 U. S. 697.

Woolf vs. Wash. R. R., 37 Wash. 491.

V.

When a motorman sees a man ahead of him alongside of the track, or approaching the track upon which his car is traveling, and this man is apparently able to take care of himself, and there is nothing about the appearance of the man which indicates any inability to care for himself, the motorman has a right to assume that this man will act as an ordinary, careful, and prudent man would act under such circumstances, and it is not necessary for him to stop his car until he sees that this man is in a position of apparent danger; then it is necessary for him to use ordinary care under the circumstances, to stop

his car for the purpose of avoiding a collision.

Dutean vs. Seattle Elec. Co., 45 Wash. 418.

#### VI.

You are further instructed, that it was the duty of the plaintiff to use his senses,—his eyes and ears—to discover the proximity and passage of the car of the defendant company, and his failure to do so would constitute contributory negligence, and prevent any recovery by him. [15]

If you should find from the evidence in this case that the plaintiff walked or fell into and against the side of the defendant's street-car, then your verdict must be for the defendant.

#### VII.

Ordinary prudence and common sense suggest to everyone who is aware of the character and operation of electric street-cars that it is dangerous to pass in front of them at a short distance while in motion, and one who does so without looking and listening, when, if he had looked and listened, he could have discovered the car, is guilty of contributory negligence and cannot recover; and if you find if the plaintiff had looked and listened he could have discovered the car, and thus have avoided the accident and injuries, and that he failed to do so; your verdict must be for the defendants.

#### VIII.

If you find from the evidence that plaintiff could by the exercise of ordinary care, and after he saw the street-car, have avoided the injury to him by getting off the track, before the car struck him, then and in that event your verdict must be for the defendant.

## IX.

You are further instructed that if the plaintiff thot he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff, and he cannot recover, and your verdict must be for the defendant. [16]

## X.

You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or to take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then and in that event it was negligence upon the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous distance of the plaintiff.

## XI.

You are further instructed that, notwithstanding you should find that the defendant was guilty of negligence, in the operation of the said car, yet, if you further find that the accident or the injury to the plaintiff would not have happened except for the negligence or failure to use ordinary care on the part of the plaintiff, then your verdict must be for the defendant.

## XII.

If you find from the evidence that plaintiff could, by the exercise of ordinary care, after he saw the street-car, have avoided the injury to him by getting



off the track, before the car struck him, then and in that event your verdict must be for the defendant.

### XIII.

You are further instructed that, if a person be seen upon the track of defendant company's electric street railway who is apparently capable of taking care of himself, the motorman may assume that such person will leave the track before the car reaches him, and this presumption may be indulged in so long as the danger of injuring him [17] does not become imminent, and it is not necessary for a motorman to slacken the speed of the car until such danger does become imminent.

### XIV.

The burden is upon the plaintiff to show by the fair preponderance of the evidence the nature and extent of the injuries he sustained, and you are not justified in awarding him compensation for purely speculative injuries or results which might or might not happen. You will not allow anything by way of punitive or speculative damages.

### XV.

If you find for the plaintiff in this case you will confine your verdict to such an amount as will compensate him for actual loss and damage, in the case. You will not allow anything by way of punishment or exemplary damages. There should not be any idea of punishing the defendant in your minds, but simply that of compensating the plaintiff for his loss, if, as I said before, you should find from the

evidence that he is entitled to recover anything.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attys. for Deft.

(Filed November 12, 1913.) [18]

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**Petition for New Trial.**

Comes now the Tacoma Railway & Power Company, defendant in the above-entitled action, and moves this Honorable Court for an order vacating and setting aside the verdict of the jury and the judgment made and entered in the above-entitled action on the 14th day of November, 1913, and granting a new trial for the following causes materially affecting the substantial rights of the defendant:

I.

Excessive damages appearing to have been given under the influence of passion or prejudice.

II.

Error in law occurring at the trial as follows:

(a) The Court erred in refusing to grant defendant's motion for a directed verdict, and in refusing to grant the requested instruction for a directed verdict.

(b) The Court erred in refusing to give defendant's requested instruction #9 as follows:

"You are further instructed that if the plaintiff thought he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part

of the plaintiff and he cannot recover and your verdict must be for the defendant.”

(c) The Court erred in refusing to give defendant’s requested instruction #10, as follows:

“You are instructed that if the plaintiff failed to look and listen and stop if necessary, or to take any reasonable precaution whatever to ascertain whether the car [19] was coming upon the track of the defendant company, then and in that event it was negligence on the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous proximity to the plaintiff.”

### III.

Insufficiency of the evidence to justify the verdict, for the reason that the evidence failed to disclose any negligence of the defendant, or its employees, which caused or contributed to any injury sustained by the plaintiff; that the evidence shows conclusively that the plaintiff failed to either look or listen or otherwise to inform himself as to whether or not a car was approaching at the time he stepped upon the track, if he did step upon the track, and was guilty of contributory negligence in failing to do so.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.

(Filed Dec. 17, 1913.) [20]



**Order Overruling Petition for New Trial.**

This cause coming on regularly for hearing in open court before Hon. Edward E. Cushman, Judge, on the 22d day of December, 1913, upon the motion of the defendant, Tacoma Railway & Power Company, for a judgment notwithstanding the verdict, and upon the petition of the defendant, Tacoma Railway & Power Company, for a new trial of the above-entitled cause; and the Court after argument of counsel and being fully advised, doth consider and adjudge that said motion for judgment notwithstanding the verdict be and the same is overruled and denied; and the Court doth further consider and adjudge that the said petition for a new trial of the above cause be, and the same hereby is, overruled and denied, to which judgment of the Court the defendant, Tacoma Railway & Power Company, excepts, which exception is by the Court allowed.

Done in open court December 23d, 1913.

EDWARD E. CUSHMAN,

Judge.

(Filed Dec. 23, 1913.) [21]

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**Assignments of Error.**

Comes now the defendant, Tacoma Railway & Power Company, a corporation, and files the following Assignments of Error, upon which it will rely upon its prosecution of its Writ of Error, in the above-entitled cause, in the United States Circuit Court of Appeals, for the Ninth Circuit, for relief

from the judgment rendered in said cause:

I.

The Court erred in refusing to give defendant's requested instruction as follows:

"You are instructed to bring in a verdict in favor of the defendant."

For the reason that the evidence failed to disclose any negligence on the part of the defendant company, and showed conclusively that the plaintiff was guilty of contributory negligence.

II.

The Court erred in refusing to grant defendant's motion for a directed verdict in favor of the defendant on the following grounds therein set forth:

1. That the evidence has failed to disclose any [22] negligence on the part of the defendant company; the evidence has failed to show that the car was being operated at an excessive and unlawful rate of speed.

2. That the evidence fails to show any grounds for the submission of the case to the jury on the ground of the last clear chance. It is not an issue in this case, and there is no evidence to show that the motor-man in charge of the car in controversy failed to exercise ordinary care after he discovered the plaintiff's dangerous position on the track, or near the track.

3. The evidence shows that the plaintiff himself was negligent in not using his senses in any way whatever to ascertain the approach of defendant's car; that he failed to either look or listen or otherwise inform himself as to whether a car was approaching

at the time he stepped upon the track, if he did step upon the track; that, had he looked, he could have seen the car, and was guilty of contributory negligence in failing to look or listen.

### III.

The Court erred in refusing to grant defendant's motion for a judgment notwithstanding the verdict, for the reason that the verdict was contrary to the instructions and was not based upon sufficient evidence to support the same; that the evidence failed to disclose any negligence on the part of the defendant company, and showed that the plaintiff was guilty of contributory negligence.

### IV.

The Court erred in overruling defendant's petition for a new trial on the grounds therein set forth. [23]

### V.

The Court erred in refusing to give defendant's requested instruction number nine as follows:

“You are further instructed that if the plaintiff thot he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff and he cannot recover, and your verdict must be for the defendant.”

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without



proper guidance, and defendant was thereby deprived of a fair trial.

## VI.

The Court erred in refusing to give defendant's requested instruction number ten, as follows:

"You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or to take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then and in that event it was negligence upon the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous distance of the plaintiff."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, [24] and defendant was thereby deprived of a fair trial.

WHEREFORE, defendant, plaintiff in error, prays that the judgment of the Honorable District Court of the United States for the Western District of Washington, Southern Division, rendered in the above-entitled cause, be reversed and that such direction be given that full force and efficiency may inure to the defendant by reason of defendant's defense to said cause.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.

**Transcript of Evidence and Proceedings.**

BE IT REMEMBERED, that heretofore and upon, to wit, the 11th day of November, A. D. 1913, this cause came on duly and regularly for hearing before the Hon. E. E. CUSHMAN, Judge of the above-named court, and a jury.

The plaintiff, being represented by his attorneys and counsel, Messrs. FITCH, JACOBS & ARNTSON; and,

The defendant being represented by its attorneys and counsel, J. A. SHACKLEFORD, Esq., and FRANK D. OAKLEY, Esq.

Whereupon the following proceedings were had and testimony taken, to wit: [26]

**[Testimony of Elling Remmen, the Plaintiff, in His Own Behalf.]**

ELLING REMMEN, the plaintiff, being called and sworn in his own behalf, testified as follows:

**Direct Examination.**

(By Mr. JACOBS.)

I am thirty-nine years old and reside one-half mile east from Fern Hill Schoolhouse, in Tacoma, and work on the waterfront, longshoreman, warehouse and harvesting. On the 7th day of December, 1912, I left my home at about half-past one o'clock and went downtown. I had sixty-five cents in money and paid five cents for car fare,—bought a glass of beer and then I bought fifty cents' worth of alcohol and then another glass of beer, at about five o'clock P. M. with my last nickel. I then started to walk home



(Testimony of Elling Remmen.)

and was run down by a street-car. Plaintiff's Exhibits 1, 2, and 3 I recognize as photographs of South Yakima Avenue between 61st and 63d Streets. About the time I crossed 61st Street "I seen a light that seemed like it was swinging on to the left,—striking to the left. I judged it to be on the Alki switch. They call it 65th Street switch on Yakima Avenue." I thought the light was a car coming downtown, going in on to the switch. I was very close to the crossing or on it when I saw the light. "I got a little further and a car came along at a good speed and passed me going from town, the same direction I was going. I might have been almost in the centre of that block. Not any more. Just a little after she passed me I was about in the centre of the block, I heard a blast of the whistle because I took notice of it. I thought that was a car that was coming behind, a tripper, as I knew by the time of the night it was, and thought it was a signal to the car that swung in first onto the switch [27] for her to stop and wait until that tripper came up." When I heard the whistle I was halfway between the fence and 61st Street. I walked down until I got to a place where the sidewalk stops, at a place I marked "X" on the photograph. I started to walk across the street to the left as I could not go further on the sidewalk, and there was an orchard and the fence in front of me. As I started to cross the street I thot I heard something. I was satisfied that I heard a car coming from the direction of town, going south. At that time I was off the end of the sidewalk, out



(Testimony of Elling Remmen.)

in the street. I kept on walking and looked around to see if I could see the headlight of the car. "I thot I seen the headlight and also other lights, but I tried to get my eyes trained on it, fastened upon the headlight of the street-car and I did not see anything so close to me that I thought there was any danger, and so I straightened up again and about that time I was on the street-car track and as I glanced ahead I saw a very short distance from me a street-car, and I thought I could make it, and I tried to jump like this, and at the same time she struck me and she rolled me over and I landed on my arms underneath." I looked southward all the time I was walking on the sidewalk and saw no street-car up to the time I started to turn out across the street. There was a street light at the place I turned to go across and a path at that point. A street light is marked [28] "X" on the Exhibit 3. 'XX shows location of Alki switch on Exhibit 3. Plaintiff's Exhibit One shows where I walked south on the sidewalk until I got to the fence that stands out in the street a good many feet, and passed the parking, and there is a well-trodden path over and across from here to here, indicating."

When I looked towards the north, thinking I heard a street-car I was between the sidewalk and the end of the fence, started off the sidewalk. I was walking across "over to \* \* \* aiming to get to that sidewalk over there on the other side." I do not remember anything [29] further until two policemen picked me up in the car at the Interurban Depot.

(Testimony of Elling Remmen.)

Someone said, "Is he drunk?" I said, "I am not drunk; I am hurt." I was taken to the hospital and stayed there for seven weeks,—was attended by Dr. Love, surgeon for the defendant. I cannot do any work. Can walk possibly a block without a cane, but it is an effort, a very hard struggle.

Cross-examination.

(By Mr. OAKLEY.)

The company took care of me at their expense. I was laid off for a few days before this accident, sick. I was canvassing for razor sharpeners for a few days before the accident. I have been taken to the police station in the patrol at different times for being intoxicated. It must be four and one-half miles from where I left 15th Street to the place where I was injured. It is a block from 61st Street to the fence. As I got to 61st Street I thought I saw a swinging light on the switch. I did not see any car, but the light must have been from the car. I did not see a car at any time coming from the south, "until she was as close as you are to me." My view was obstructed by the orchard and the fence.

Q. Did you at any time from the time you went out back of that fence out into the street, look to see whether a car was coming from that direction, or not?

A. No, sir. I looked the other way as I thought that I heard a car coming up the other way.

Q. Where were you when you looked for the car coming the other way?

A. I was leaving the sidewalk to go out into the street. [30]



(Testimony of Elling Remmen.)

Q. You were leaving this cement sidewalk?

A. The end of the cement sidewalk, yes, sir. Then I looked down towards Tacoma and thot I saw a headlight.

A. I tried to be sure of it and kept on walking and then turned around up the other way as I thot that car was not close enough to hurt me anyhow, and then I got my eye on this other car.

Q. When did you hear the blast of the whistle?

A. Probably one-halfway between 61st Street and the fence.

Q. Where did that come from?

A. It sounded from the south, Alki switch.

Q. You heard the blast of a whistle halfway between 61st Street and the fence?      A. Just about.

Q. Then you knew the car was coming?

A. I thot the car was going to stay there on account of another car coming up.

Q. You knew what the blast of the whistle of a street-car means?      A. I thot it meant to stop.

Q. Did you ever hear a street-car give a whistle when it was going to stop?

A. For another car behind it.

Q. Why did you look towards the city when you heard the whistle at Alki switch?

A. I thot there was a tripper behind the one coming on south. I thot the car was coming and was going to stay there on account of another car coming up. I thot the whistle meant to stop. I looked towards the city when I heard the whistle at Alki switch, because I thot there was a tripper behind [31] the one coming on south.



(Testimony of Elling Remmen.)

Q. You did not pay any attention at all to the whistle?      A. I did, sir.

Q. What did you do?

A. I looked for the car coming.

Q. Did you look in the opposite direction?

A. I did, sir, because I thot this meant for the car coming from the opposite direction.

Q. What kind of a whistle?

A. Just one short blast. I think the edge of the fence is twelve feet from the street-car track.

Q. Where were you when you were hit by the street-car?

A. I must have been between the two tracks, and when the \* \* \* [32] I seen the car and made a jump and got just about to the east track there. When I first saw the street-car that struck me it was ten feet away, and I was about the middle of the car track. I was struck right opposite this fence. The right side of my body was struck by the car. I could not say it was the side or end or what part of the car struck me. I did not know anything about the fender of the car. I did not see any headlight on the car. After I left 38th Street it was raining a little drizzle.

**[Testimony of C. R. Bailey, for Plaintiff.]**

C. R. BAILEY, being called on behalf of the plaintiff and duly sworn, testified as follows:

**Direct Examination.**

(By Mr. JACOBS.)

I am a warehouse foreman of the Sperry Flour Mills, for whom Mr. Remmen worked at different

(Testimony of C. R. Bailey.)

times. The work was satisfactory. He never came to work intoxicated, or under the influence of liquor.

**[Testimony of Oren Polley, for Plaintiff.]**

OREN POLLEY, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. JACOBS.)

In December, 1912, I resided at #6511 South "G" Street, and on the 7th day of December, 1912, witnessed the accident. I had been waiting at 64th and Yakima Avenue south for a car, waited about half an hour and there was no cars came along and I seen what I thought was one car at the time down at 56th and South Yakima Avenue, and then I walked down to 61st Street to take the car instead of standing there; it was a cold, nasty, wet evening, [33] and so I started on down and I walked down pretty close to 62d Street and there was one of those cars passed me; I was about 63d Street when one of the cars passed me south, going towards Fern Hill and I was going to run first,—I thought I would not have time to catch it, and then I see this, car coming,—it was coming from 56th Street and Yakima Avenue, and I was walking slow—in the meantime I seen this gentleman who was hurt coming on the other side of the street, right opposite from me, and as he crossed—came towards the track, I heard a sound and there was this other car coming and he was just about the centre of the track then, and they did not blow a whistle or give a signal that there was a car coming and it struck him before he got a chance to step



(Testimony of Oren Polley.)

off, struck him with the corner of the car.

Q. Where was he?

A. Just making his last step, if he had a second more he would have got off, but he was making his last step to get off the rails.

On Exhibit I, I marked the place where I was when I saw him with the letter "O." When the car struck him it threw him about to where the letter "V" is. I was right in between the sidewalk and the telephone pole, when he was hit. The right-hand corner of the car hit him. I was about 75 feet from him when they hit him. When I first saw the car or heard it, it was just about opposite to me. I was watching it over at 56th Street. I thot the tripper was coming to follow in the Alki switch, and I was watching for those fellows—there was one car went up and there was another tripper at 56th Street, and I supposed it was going to pass it at Alki switch, and therefore I had plenty of time to get it. I expected both cars coming from town were going to pass at Alki switch.

[34]

The car was about 100 feet from the plaintiff when I first saw it. I yelled just as it struck him and they knocked him off the track. Just before the car reached him I saw the plaintiff going from the sidewalk near the fence which projects about 12 feet out. The car gave one long blast of a whistle just after it hit him. There was a car following this car. It had stopped at 64th Street to pick up passengers. Neither 62d or 63d Streets are cut through. After he was hit they placed him up against the bank, at the placed marked X. I heard the conductor say,



(Testimony of Oren Polley.)

“Let the damn fool lie there; he is nothing but a drunk.”

Q. Who said that?

A. The motorman on the front car that struck him.

At the depot the motorman said, “He is drunk,” and the fellow says, “No, I am hurt.” At the time of the accident the motorman said the plaintiff walked into the side of the car. As the car passed “I seen the motorman rubbering back at his conductor in the back end. He had his doors open.”

Cross-examination.

(By Mr. OAKLEY.)

When the motorman blew the whistle Remmen was lying there in the mud. When I heard the car coming I turned around and saw that the car was about 100 feet from Mr. Remmen, who was coming on to the track. He was on the track when I turned my head again. Just going to stop and step off the track. I did not have any trouble in seeing or hearing the car. Just as I turned around they struck the man. He was looking towards 56th Street. [35]

**[Testimony of John E. Timmermann, for Plaintiff.]**

JOHN E. TIMMERMANN, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

On the evening of December 7th, 1912, I was a passenger on the car that struck plaintiff. I boarded the car with my wife at Fern Hill, and a little before we reached Akli switch the conductor had gone up into the front vestibule with the motorman, and he

(Testimony of John E. Timmermann.)

shook the door and the motorman opened it and he went out and came back in. They stayed out there until just about the time they reached the switch, and the conductor came out of the car and he pulled the doors up and they laid there on the siding for about a minute and there was another car coming up. After the car had passed we started on and the swaying of the car had opened the doors connecting the front vestibule with the inside of the car. As we hit 64th Street I looked out of the car at the front end, the doors were still working themselves open, and I noticed the motorman looking back inside of the car over his shoulder, and I looked at him steadily from that time on until I happened to see into the distance a man standing there as I thot at the side of the track. It struck me for a moment that he was pretty close to it, and I could see this man standing there, as I thot he was, all the while the motorman was looking back. In fact, I was looking at him and this fellow was almost in a line with me, and so I could not help from seeing both of them. So we got up to this fellow and I supposed he was out of harm's way and thot nothing of it, and I thot I felt the impact of something hitting the car. At the same time the motorman turned [36] around and slapped off his power and stops the car. I did not get off the car immediately. They took plaintiff and put him on the car. The motorman off the car that followed and the conductor from the other car brought him in and put him about the middle of the car in a seat opposite to us. They laid him to the south of the house with the little porch sticking out here in front (indicat-



(Testimony of John E. Timmermann.)

ing). I noticed the stump that night to my right. From the time the car left 64th Street up to the time plaintiff was hit, the motorman was looking back into the car. I was sitting on the left-hand side of the car and did not see plaintiff before he had crossed the track. I thot probably he was standing at the crossing at 63d Street waiting for the car. I did not know whether he was on the track or off the track at that time.

Cross-examination.

(By Mr. OAKLEY.)

When I first saw Mr. Remmen the car was anywhere from 100 to 125 feet from him. I thot he was waiting for the car. He was on the right side of the car,—“on the right side as you come down,—the proper place for anyone to wait for it.” I was seated two seats from the rear of the car, not counting the one that runs lengthwise of the car. The plaintiff was facing to the south when I saw him, what would be towards 61st Street. I could see the “V” of his vest and his shirt front. From appearances the way he was standing he seemed to be looking towards the car. I could not see his head. I did not hear a whistle at any time. I could see a bright headlight ahead. I was looking at the motorman. I did not see Mr. Remmen move after the first time I saw him. I could not say whether it was the front or side of the car that hit [37] him. I made a written statement. Defendant’s Exhibit “A” is correct, except that part about the motorman’s head being in the way of Mr. Remmen, because the motorman’s head was



(Testimony of John E. Timmermann.)

not in the way until he blocks the entire view. In other respects it is the same.

**[Testimony of Dr. W. D. Reed, for Plaintiff.]**

Dr. W. D. REED, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

I am a regularly licensed and practicing physician and surgeon in the State of Washington, and have been practicing in Tacoma for a number of years. I examined Mr. Remmen after the accident and found there was a slight depression in the side of his head. Hearing in left ear diminished. I found that the right shoulder was slower in action and more limited. Also that the principal trouble was that his right knee was considerably swollen, the tissues thickened about it; also that the internal cartilage of the knee-joint had been dislocated, broken, and internal condyle, or the extended portion of the thigh bone, on the inner side, there was a considerable callous. The injuries are permanent. [38]

**[Testimony of Dr. W. M. Karshner, for Plaintiff.]**

Dr. W. M. KARSHNER, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

I am a regularly licensed and practicing physician in the State of Washington, and reside and practice in the city of Puyallup. From an examination of the plaintiff I found the hearing in the left ear impaired, about one-fourth. I also found a slight de-

(Testimony of Dr. W. M. Karshner.)

pression on the right side of the head. What caused it I do not know. I found a floating cartilage in the right knee. The right knee is about three-quarters of an inch larger around than the left one. The injuries are probably permanent.

**[Testimony of Mrs. John E. Timmermann, for Plaintiff.]**

Mrs. JOHN E. TIMMERMANN, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

I boarded the car with my husband, John E. Timmermann,—after the car left 64th Street the motor-man was looking back into the car, all the while until it felt like he hit something, and then he stopped.

Cross-examination.

(By Mr. OAKLEY.)

The conductor was right back of us collecting fares, near the rear end of the car.

**[Testimony of Mrs. Anna Remmen, for Plaintiff.]**

Mrs. ANNA REMMEN, being called on behalf of the plaintiff and duly sworn, testified as follows:

Direct Examination.

(By Mr. FITCH.)

I am the wife of the plaintiff. I saw my husband [39] at the hospital, the day after the accident,—he was in a dazed condition and did not seem to realize much, and claimed that he was hurt about the neck, head, shoulder, knee and ankle. Since then he has



(Testimony of Mrs. Anna Remmen.)

been complaining about his head and his knee has always pained him.

**[Testimony of Miss Etta Erickson, for Defendant.]**

Miss ETTA ERICKSON, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a nurse in the Tacoma General Hospital, and was so employed on the 7th day of December, 1912, I saw the plaintiff when he was brought in after the accident. I think he was intoxicated. He was very noisy and his breath smelled of liquor. He was boisterous. For about an hour or so I had trouble taking care of him. He did not appear to be out of his head, only talking irrationally. I do not know whether his clothing had been saturated with a bottle of alcohol—it might have been from that source.

**[Testimony of Elmer J. Calkins, for Defendant.]**

Mr. ELMER J. CALKINS, a witness called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am one of the city jailers and am acquainted with the plaintiff. I saw the plaintiff at the Interurban Depot. We took him out of the car and took him into the city ambulance or patrol wagon up to the hospital. I assisted in getting him out of the car. He was intoxicated. I have seen him in the city jail perhaps four times for being intoxicated. I have seen him paralyzed drunk and have seen him [40]



(Testimony of Elmer J. Calkins.)

to the extent of having delirium tremens. He has been in the city jail since the accident.

Cross-examination.

(By Mr. FITCH.)

I believe he was drunk when he was in the city jail since the accident. I am not positive. I am sure that he was drunk when I took him out of the car. I do not remember whether the motorman or conductor said that he was drunk. No one told me that he was drunk at that time. I do not remember that Mr. Remmen said, "No, I am hurt." If the bottle of alcohol had been broken in his pocket I might have smelled it instead of his breath. I have seen him drunk before and I think he was drunk at that time. I could tell from his talk.

**[Testimony of Charles S. Payne, for Defendant.]**

CHARLES S. PAYNE, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live in the City of Tacoma and have been employed as motorman for the defendant from two years back, and was in charge of the car at the time of the accident in controversy. "I seen a man run out from the sidewalk; when I first seen him he was about eight feet from the car, from the side. He appeared as though he wanted to catch the car. I was inbound, this side of 64th street, between 64th and 63d streets, and when I seen him I tooted the whistle, and he started to step out and he struck the car somewhere about the center of the car. The street light

(Testimony of Charles S. Payne.)

was out at 63d street and I saw him when he come into the rays of the light of the car.” [41] “I seen him come staggering through the mud towards the car and he struck, as near as I could tell by looking in the glass from ten or fifteen feet from the rear of the car, and went backwards into the mud, and then he went out of my view in the glass and I stopped about a car and a half length or two car-lengths from where he fell.” The car did not stop at 64th Street, which is about 100 or 150 feet from Alki switch,—the car was traveling at about ten or twelve miles per hour. The car was about 50 feet long, with back vestibule on both ends with center posts, with two folding doors inside the entrance on both ends of this car. The doors were closed and hooked. I know positively the conductor tried to get out at Alki switch to get through the head end in order to put the trolley on and the doors were hooked and I did not open them. The doors were opened last at Fern Hill when I hooked them there. The curtains obstructed the view of all passengers who could not see into the vestibule. The curtains pull down on the inside of the car and the curtains are used to keep the light out from reflecting on the window so you can see ahead and see around. If these curtains are up the light would reflect on the windows and you could not see past the windows. It is absolutely necessary to have the curtains pulled down. I could not see where the conductor was on account of the curtains, but I could hear the register ringing. He was collecting fares. I was not looking back into the car



(Testimony of Charles S. Payne.)

after leaving 64th Street. I was looking straight ahead. The front slide window was down. There were people standing at 64th Street but we did not stop, I let the car following us pick them up. This car was three or four car-lengths behind us. [42] When Mr. Remmen was struck our car had gone about three-quarters of a block beyond 64th Street, and at the point in front of Mr. Barrett's house. When I first saw Remmen he was staggering towards the car. To the right of the car in the street. He was out in the traveled road about six or eight feet from the car track. I was then about a car-length from him when he came out of the road onto the track when I first saw him. I then started to stop. I blew the whistle as soon as I saw him. There is a mirror which is fastened on the side of the vestibule of both ends. On both ends of the cars which have double ends, set at an angle so that a motorman can look into it and see everything at the rear of the car within six or eight feet from the car. I saw Mr. Remmen through this mirror hit the car and take a couple of staggering steps and then fall out of my view. There are step lights on the car, one in front and one back of the car. These lights show everything up so you can see everything between the mirror and the rear light on the step. The car had fenders on both ends. If a man was struck by one of these fenders it would pick him right up. Mr. Remmen was not struck by a fender. After I saw him hit the side of the car I stopped immediately, jumped out of the car and ran over to where he was.



(Testimony of Charles S. Payne.)

I was the first one there. He was lying on his back in the mud, about four feet or five feet from the track. I stooped over to pick him up and his breath smelled strongly of liquor. When I stopped the car the front end of the car was at about 63d Street, and he was about two car-lengths back from 63d Street. About in front of Barrett's house. Mr. Barrett telephoned from his house for the city ambulance. [43] The headlight in the car was light at the time and in good condition.

Cross-examination.

(By Mr. FITCH.)

I know we were on time,—that at no time after we left Alki switch was your door open into the car. I was not looking back over my shoulder into the car. The door was closed because the front window was open. When we passed 64th Street, the car was going between three and five miles per hour. I am positive that we were not five minutes behind time when we reached Fern Hill. Sixty-third Street is not open thru,—there is a gate right about the center of the fence at that point. There is a sidewalk running parallel with the track. The cross street where 63d Street would come in is not graded. It is just a board crossing,—it is about 120 feet from the south line of 64th Street, up to the south line of the fence. I stopped with the front end of the car on 63d Street. When Mr. Remmen ran into the side of the car he was about a car-length south of the south end of the fence. I never noticed the fence particularly at all. It was not usual for people to go across the street on

(Testimony of Charles S. Payne.)

the path near the north side of the fence. It was muddy there. The car ran about one and one-half to two car-lengths after striking the plaintiff. I could not state for sure whether the plaintiff was taken to the bank or not. There is an embankment six or eight feet. I could not climb up there anyway. I am not positive whether we laid him up there or not. I did not make the statement that he was drunk and that he had better be left there. [44]

Redirect Examination.

(By Mr. OAKLEY.)

The accident happened about 7:00 o'clock P. M., according to my watch.

**[Testimony of Dr. L. L. Love, for Defendant.]**

Dr. L. L. LOVE, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a regularly licensed and practicing physician and surgeon in the State of Washington and am physician and surgeon for the defendant company. I saw the plaintiff on the morning of December 8th, 1912, at the hospital. He was in bed with a badly swollen knee, some disfigurement about his face and complaining of his shoulder. He told me that he was in Tacoma on Pacific Avenue on the evening of December 7th, with sixty-five cents in his pockets, bought a flask of whiskey with fifty cents, two glasses of beer with the other ten cents and then walked home. That he got hurt,—did not know the manner in which he got hurt, but that he had been drunk for



(Testimony of Dr. L. L. Love.)

four days before this happened. There was evidence of his intoxication at that time. He had a foul breath and coated tongue, and every indication that he had been intoxicated. I treated him for several weeks. Put his leg in a plaster cast and the last time I saw him he had an internal fracture of the internal condyle of the femur. The skull was in a practically normal condition. He had no trouble with his ears as far as I knew. [45]

Cross-examination.

(By Mr. FITCH.)

I believe he complained of a head cut but there was no indication of head injuries. No bleeding of his ears or mouth. No injury to his head. No depressions of the skull. I am of the opinion that unless he has an operation his knee will bother him more or less.

**[Testimony of Edward J. Peacher, for Defendant.]**

EDWARD J. PEACHER, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a chauffeur working for the Pacific Taxicab Company and on the 7th day of December, 1912, I was living at Parker Street on the Spanaway line and was a passenger on the car on the night of the accident. I got on at Fern Hill and was standing on the back platform next to the entrance and as we passed 64th Street, I looked out and looked ahead to see where we were. I was intending to get off at 61st Street, and just as I looked out I saw a man very



(Testimony of Edward J. Peacher.)

near the side of the car, and a second later he was up against it and when we hit him it turned him around a couple of times, and he lit on his back in the mud, about the middle of the street. He was still standing when we passed him. I was right on the back platform, right at the entrance. When I first saw the plaintiff he was right longside of the car and then within two or three feet of it. The front end of the car had passed him. The car went about 100 feet after Mr. Remmen fell. I had lived within four blocks of this place for about two years and am familiar with the [46] location of everything along there. Mr. Remmen struck the side of the car about halfway back and after the rear end had passed him he fell. I saw him just as he lit in the mud. The car was traveling fifteen miles per hour, not more. Mr. Remmen fell about 100 or 150 feet from 63d Street. I then rode on the car to 61st Street and got off. I do not think I heard the motorman say anything about leaving the drunk lie there.

Cross-examination.

(By Mr. FITCH.)

The point where I saw Mr. Remmen run into the car was about 150 feet south of 63d Street.

**[Testimony of Alfred Fuller, for Defendant.]**

ALFRED FULLER, being called in behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live about one block south of where the accident happened and have lived there for about eleven years.

(Testimony of Alfred Fuller.)

I got on the street-car following the one that struck Mr. Remmen at 64th Street. The car I was on followed the head car at about two or three hundred feet distant. I was on the rear platform when the car stopped. I saw Mr. Remmen lying in the road. He had not been picked up yet. The motorman off the car I was on and the motorman on the other car picked him up and laid him across the street at a point somewhere between 63d and 64th Streets. I was there until they put him on the car and started off. The car that struck Remmen was about a car or two car-lengths ahead of where he lay. [47]

Cross-examination.

(By Mr. JACOBS.)

I lived there in the back of the green house, right near the gate. The night was dark, it had been raining, because the roads were awfully muddy. I did not notice any lights on the pole. Whether there was one there or not, I do not know. When I got off the car I looked at the place where I saw the man lying and I go by that place two or three times a day and have for many years.

**[Testimony of Louis Barrett, for Defendant.]**

LOUIS BARRETT, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a patrolman for the City of Tacoma, and live pretty close to the point where the accident happened. I saw there was some trouble from our sitting-room. That the car had stopped and I and my

(Testimony of Louis Barrett.)

daughter opened the front door and went out and we saw the man that got hurt. "We went out to where the car was." I saw that the man was all muddy and that he was hurt, so I told him that it was pretty hard to get the patrol wagon down there and that they had better take him down on the car, so I went across to the neighbors and called up the police station and had the wagon meet the car at the Inter-urban Depot. When I saw Mr. Remmen he was sitting up a little ways from the car towards 64th Street,—not more than 20 or 25 feet from my house.  
[48]

**[Testimony of Dr. R. S. J. Whittaker, for  
Defendant.]**

Dr. R. S. J. WHITTAKER, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am a regularly licensed and practicing physician and surgeon in the State of Washington. I made an examination of the plaintiff at which time his only complaint was in regard to his knee. I made an examination and found that he suffered from a fracture of the inner side of the lower end of the femur, where there was a diagonal fracture. In order to remedy the condition it would be necessary to perform an operation.



**[Testimony of Miss Nellie Barrett, for Defendant.]**

MISS NELLIE BARRETT, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live at #6316 South Yakima. My father testified in this case yesterday. I was in our house at the time of the accident, and my attention was called to a car stopping in front of the house, and I looked out and I saw the car stop. It is unusual for the car to stop in front of our house, and I called my father's attention to it because I saw a man who was hurt. The point where Mr. Remmen was hurt was about five lots from 64th Street. It was some five lots from 63d Street. Our house is nearly to 64th Street, nearer than to 63d Street. The car had not reached 63d Street. [49]

**[Testimony of William J. Baird, for Defendant.]**

WILLIAM J. BAIRD, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

On the night of the accident I boarded the car following the one that struck Mr. Remmen, at Fern Hill. When I first saw Mr. Remmen they were starting to take him up from alongside of the track. They were picking him up after we left 64th Street. I did not know how close it was to 63d Street. I could not say that it was between 63d Street and 64th Street. I did not pay any attention to that.

**[Testimony of Martin E. Cramer, for Defendant.]**

MARTIN E. CRAMER, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live at Puyallup and have been employed by the defendant company as motorman for thirteen years. I was motorman on the car following the one in which the accident occurred. I was following the Larchmont tripper. We got to Alki, delayed there for a little while, passed a car, and the Larchmont tripper pulled out and I pulled out immediately behind it. There were a few people standing at 64th Street and I was shortly behind the car. I gave two toots of the whistle to tell the motorman to go ahead and I would pick up these. It is the general custom to do that at that time of the evening, to make every other stop, in that way so both cars will make time, and I stopped at 64th Street to pick up the people and pulled out. When I saw the other car slowing down I slowed down. I stopped my car, I guess two car-lengths from the other car, and we went up and [50] saw Remmen lying out in the street between the track and the curb, about ten feet from the car. I heard a man say that he must have been drunk. I made the remark then, "This is not the first time I have seen him that way," and so we carried him over to the bank, which was about two feet high. Where I picked him up was between 64th and 63d Streets. I should say about two car-lengths from 63d Street. Mr. Remmen appeared to me to be intoxicated. I



(Testimony of Martin E. Cramer.)

do not remember seeing any bottles around there. I have seen him intoxicated several times about Fern Hill. I waited once there for him to get off the track. It is always customary when the lights are turned on in the cars to pull the curtains down. If this is not done lights burning in the car will throw a reflection out through the window. The mirror located on the right-hand corner of the car is hung so that all I have to do is to look into the glass and can see each and every person who gets on the car.

Cross-examination.

(By Mr. FITCH.)

The main use of the mirror is for observing people boarding and leaving the car. The mirror also affords great facility in stopping on crossings where the streets are muddy. If a motorman looks into his mirror he can get the crossing nine times out of ten. If a motorman is looking into the mirror he is not looking directly ahead. He is looking through the side window. The accident occurred about a quarter to seven. [51]

[**Testimony of Fred G. Woodward, for Defendant.**]

FRED G. WOODWARD, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am employed as a draftsman by the defendant; and am the one who made the map of the street involved in this controversy, which is marked Defendant's Exhibit "B." The distance between 61st and 64th Streets is 970 feet. The distance between 63d



(Testimony of John A. Jackson.)

and 64th Streets is 483 feet. The distance from the fence to 61st Street is 293 feet.

**[Testimony of John A. Jackson, for Defendant.]**

JOHN A. JACKSON, being called on behalf of the defendant and duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am assistant claim agent for the defendant company. I made a search for Mr. Porter, the conductor in charge of the car at the time of the accident and found that he had gone south into California, and was unable to get him for the trial. [52]

Thereafter, at the close of all the testimony, the jury being excused, counsel for defendant made motion for a directed verdict in favor of the defendant as follows:

**[Defendant's Motion for a Directed Verdict, etc.]**

The defendant, at the close of all the testimony on behalf of both the plaintiff and the defendant, moves the Court to direct the jury to return a verdict for the defendant on the following grounds:

1. That the evidence has failed to disclose any negligence on the part of the defendant company; the evidence has failed to show that the car was being operated at an excessive and unlawful rate of speed.

2. That the evidence fails to show any grounds for the submission of the case to the jury on the ground of the last clear chance. It is not an issue in the case, and there is no evidence to show that the motorman in charge of the car in controversy failed to exercise ordinary care after he discovered the

plaintiff's dangerous position on the track, or near the track.

3. The evidence shows that the plaintiff himself was negligent in not using his senses in any way whatever to ascertain the approach of defendant's car; that he failed to either look or listen or otherwise inform himself as to whether a car was approaching at the time he stepped upon the track, if he did step upon the track; that, had he looked, he could have seen the car, and was guilty of contributory negligence in failing to look or listen.

Whereupon, after argument of said motion by the counsel for the respective parties, the Court overruled said motion, to which ruling the defendant excepted and exceptions were allowed by the Court.  
[53]

**[Instructions Requested by Defendant.]**

The defendant requested the Court in writing to charge the jury, among other things, as follows:

You are instructed to bring in a verdict in favor of the defendant.

#9.

You are further instructed that if the plaintiff thot he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff and he cannot recover, and your verdict must be for the defendant.

#10.

You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or to take any



reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then and in that event it was negligence upon the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous distance of the plaintiff.

Whereupon, after argument of the case to the jury, by the respective counsel, the Court charged the jury as follows, to wit: [54]

### **Instructions.**

#### **GENTLEMEN OF THE JURY:**

You will, at the conclusion of the Court's instructions, retire to your jury-room to determine upon the verdict in this case and will take with you the pleadings and the exhibits in the case. These pleadings consist of the Complaint, the defendant's Answer and the plaintiff's Reply. It is your duty to resort to these pleadings in order to determine just what the parties allege against one another. Briefly, though, the Complaint charges—the Complaint of the plaintiff—that on this evening, in question, he was walking the street where he had a right to be, and that one of the defendant's cars was so negligently operated as to injure him. The defendant in its Answer says that it was not negligent and that the plaintiff was injured by reason of his own negligence in failing to use his faculties, his eyes and his ears, and to conduct himself as an ordinarily prudent and careful person would under the same circumstances; that that is the reason he was injured.



The plaintiff in his Reply denies he was negligent in the manner charged by the defendant. So you will observe each side charges the other,—the plaintiff charges the defendant [55] with negligence in the operation of its car and the defendant charges the plaintiff with negligence,—contributory negligence in his conduct and each says the other's negligence was the cause of the injury. Negligence is defined as the want of ordinary care, and ordinary care is defined as that amount of care that an ordinarily careful and prudent person would use under the same circumstances and should be proportioned to the peril or danger reasonably to be apprehended from the want of proper prudence. This is the amount of care that is required of each party in this transaction at the time of this accident.

Both the defendant and the plaintiff had a right to use the street, but each was bound to use the street with due regard to the rights of the other. On account of the fact that a street-car can only travel on fixed rails on a given line, while a pedestrian can take any part of the street he sees fit, the pedestrian is bound to take into consideration that fact in controlling his movements. If he has an opportunity, and can, in the exercise of ordinary care, get out of the way of a street-car, it is his business to do so, both on his own account, to preserve himself from injury, and to allow the street-car company to conduct its business. The motorman, and those in charge of the street-car, it is their duty to exercise that degree of care that ordinarily careful and prudent persons would exercise in the operation of a street-car to avoid injury to pedestrians who are using the street;

that is, as one of the attorneys called to your attention, and as the Court did in stating the charge in the Complaint, the plaintiff charges the defendant was negligent in the operation of its car, without particularly pointing [56] out the exact negligence upon which he relies. In plaintiff's argument, they argued to you that the car was running at too great a rate of speed, no proper lookout kept and no proper signals given. The motorman in charge of defendant's car, it was his duty to run that car, not in excess of the rate of speed, at a rate of speed at which ordinarily careful and prudent persons would have run it under the circumstances, and it was his duty to keep a lookout such as ordinarily careful and prudent persons would have kept under the same circumstances, having regard to his other duties which he was charged with performing. It was his duty to give such signals as an ordinarily careful and prudent person would have given to those he would have reason to believe were using the street, to warn them of the approach of the car in order to enable them to avoid the danger of a collision with the car.

Also, it is the duty of the plaintiff to exercise the care that an ordinarily careful and prudent person would for his own safety under the circumstances and surroundings at this time. As I have before defined to you, negligence is want of ordinary care, and ordinary care is that care that an ordinarily careful and prudent person would exercise under like circumstances, and should be proportioned to the peril and danger reasonably apprehended from a want of proper prudence.



There has been various things pointed out from the evidence in this case as regarding where foot-passengers cross the street-car line, and about some obstruction and the time of day or night it was; whether this was a street that was frequented much by pedestrians. All those, and the other circumstances that were disclosed by the evidence here, are things to be taken into consideration by you in determining [57] whether the motorman was exercising ordinary care, and you will also take into consideration all the circumstances shown by the evidence whether the plaintiff exercised ordinary care, and among these would be the fact of his crossing the street-car track, for the plaintiff was bound to make such use of his faculties, his eyes and his ears, and to conduct himself in the manner that an ordinarily careful and prudent person would before he can recover anything, even if the defendant was negligent, and the very fact that a street-car track is dangerous, and if a man does not use his faculties, his eyes and his ears, his liability to be brought into danger is one of the circumstances you are to take into consideration in determining whether he made such use of his faculties as an ordinarily careful and prudent person would at the time of the injury and prior thereto.

The plaintiff, before he can recover, must establish, first, that the defendant was guilty of negligence in the matter of which he complains, and, second, that he was injured, and third, that his injury was the proximate result of the defendant's negligence of which he complains. Unless the plaintiff can establish these allegations by a fair preponderance of the evidence, he cannot recover. Before the plaintiff



could recover in this suit, I think I have already made it plain, but I will repeat it,—before he can recover in this suit, he must not have contributed in any way to the happening of the accident by his own negligence or want of ordinary care.

The defendant, having charged the plaintiff with contributory negligence, the burden of proof, that is, the burden of establishing contributory negligence on the plaintiff's part rests upon the defendant, unless the plaintiff, has, by [58] his own evidence, shown that he was guilty of contributory negligence or want of ordinary care which contributed to his injury.

The Court will give you a number of written instructions. In so far as they may be a repetition of what the Court has already orally instructed you, you will not conclude that the Court is trying to impress those upon you as being more important than those not repeated.

“The Court instructs you that the law presumes nothing in favor of the plaintiff or his allegations in his Complaint. The burden of proof is upon him at all times to establish affirmatively his allegations of negligence against the defendant company. He must prove this by a fair preponderance of the evidence. The fact that an accident may have occurred to him and that he may have sustained an injury while crossing defendant's street-car tracks about 62d and South Yakima Avenue, in the City of Tacoma, on the day in question, raises no presumption of liability against the defendant company. Plaintiff must prove first by a fair preponderance of the evidence that the defendant company's car was

being carelessly and negligently operated on South Yakima Avenue, and if you find from the evidence on this point that the evidence for the plaintiff and the evidence for the defendant is evenly balanced in your minds, then your verdict must be for the defendant company, because the plaintiff has failed in his proof.

The plaintiff must follow this first proof with other proofs, and must likewise establish by a fair preponderance of the evidence that the injuries which he suffered were the direct and proximate result of the negligence of the defendant [59] as set forth in the Complaint, and, again, if the evidence on this point is evenly balanced both for and against the plaintiff, your verdict must be for the defendant, because the plaintiff has again failed in his proof.”

“The defendant charges that this accident was the result of the carelessness and negligence of the plaintiff himself, in that while the defendant’s car was being operated on South Yakima Avenue between South 64th and South 63d streets at a moderate and lawful rate of speed, plaintiff heedlessly, recklessly, carelessly and unnecessarily placed himself in a position of great danger, to wit: By walking or running across the said street in close and dangerous proximity to defendant’s car, and striking and colliding with said car, and that he failed to exercise his mental faculties in any way to observe, escape or avoid the risks and dangers of his position, which were open and apparent to him, and should have been easily avoided, and that he failed to take any care or precaution whatever to provide for his personal safety.

I charge you that the rights of a street-car com-



pany and the rights of a pedestrian upon the street are mutual and concurrent, and that they must each be exercised with reference to the use of the street by the other. Neither one has the use or the monopoly of the use of the public street, but the law holds that because of the weight and character of a street-car, in that it travels on fixed rails and cannot be stopped or turned out of the way as a wagon or a pedestrian can, that it is the duty of the pedestrian to consider this fact in crossing the street. It is the pedestrian's duty, before stepping on the car track, to make reasonable use of his senses for his own safety to ascertain whether or [60] not a car is approaching, and if he does not do so, and that failure on his part contributes to his injury, he cannot recover, even though those operating the car were also negligent, or to state this proposition in another way, I instruct you that if you find that both the plaintiff and the motorman in charge of the car were negligent, and that as a result of such joint or concurrent negligence, that is the negligence of both parties concurrently contributed to the injury and an accident occurred, your verdict should be for the defendant. The law in a case of this kind does not consider the degree of negligence of the respective parties. If the defendant was guilty of negligence, and if at the same time the plaintiff's negligence also contributed to the injury, your verdict must be for the defendant, regardless of that degree or extent of the negligence of the respective parties. Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution, that but for his own negligence or want of



ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover, and your verdict must be for the defendant."

"You are further instructed that it was the duty of the plaintiff to use his senses, his eyes and ears, to discover the proximity and passage of the car of the defendant company, and his failure to use his faculties as an ordinarily careful and prudent person would do under such circumstances, would constitute contributory negligence and would prevent any recovery by him."

"If you find from the evidence in this case that the plaintiff walked or fell into and against the side of defendant's car, then your verdict must be for the defendant." [61]

"If you find from the evidence that the plaintiff could, by the exercise of ordinary care, and after he saw the street-car, have avoided the injury to him by getting off the track before the car struck him, then, and in that event, your verdict must be for the defendant."

"You are further instructed, that if a person be seen upon the track of defendant company's electric street railway, who is apparently incapable of taking care of himself the motorman may assume that such person will leave the track before the car reaches him, and this presumption may be indulged in so long as the danger of injuring him does not become imminent and it is not necessary for a motorman to slacken the speed of the car until such danger becomes imminent," that is, if, under the circumstances, it is reasonably apparent to the motorman that the man knows the car is coming and will have

time to get out of the way, he has a right to presume that he will do so.”

“The burden is upon the plaintiff to show by a fair preponderance of the evidence the nature and extent of the injuries he sustained. You are not justified in awarding him compensation for purely speculative injuries which might or might not happen. You will not allow anything by way of punitive or speculative damages.”

“If you find from the evidence for the plaintiff in this case, you will confine your verdict to such an amount as will compensate him for the actual loss and damage in the case. You will not allow anything by way of punishment or exemplary damages. There should not be any idea of punishing the defendant in your minds, but simply that of compensating the plaintiff for his loss, if, as I said before, you should find from [62] the evidence that he is entitled to recover anything.”

If you should find for the plaintiff and come to the assessing of his damages, you will take into consideration all that has been shown by the evidence concerning any pain or suffering he has endured, and to what extent his earning capacity may be impaired, and what, if any, employment he may have lost by reason of the injury received by colliding with the street-car company's car of which he complains.

And one of the circumstances you are entitled to consider is his probable length of life. The plaintiff has introduced in evidence certain tables that have been compiled by life insurance companies as to the probable length of time that a man will live after he has reached the age of thirty-nine years, and these



tables show he will probably live twenty-eight years; that is, the ordinary man, such as were included in their observation and from which they compiled these tables. You will not simply follow that rule to the exclusion of the other evidence in the case, but that is one of the circumstances you will be authorized to take into consideration in determining how long this man will probably live.

You will not allow him anything for future pain and suffering or future loss of employment, unless you find from the evidence that it is reasonably certain that he will continue to suffer in the future and that he will continue in the future to be impaired in his earning capacity. The law requires something more than mere probability to justify you in returning a verdict for future pain and suffering or future impairment of earning ability, and the law has laid this down as having to be shown to a reasonable certainty before you can allow such damages. [63]

The Court instructs you that wherein the burden of proof in this case is upon the plaintiff, and wherein the burden of proof is upon the defendant; that the party having the burden of proof must establish his allegations by a fair preponderance of evidence.

A fair preponderance of the evidence has been defined as the greater weight of evidence, that is that evidence which preponderates, which is of such nature, and of such persuasive nature, and so appeals to your intelligence and understanding and experience as to create and induce belief in your minds, and if there is evidence against it, or arguments produced against it, that it still is of such a character as to



create and induce belief in your minds in spite of what has been brought against it.

You are, in this case, as in every other case where questions of fact are submitted to the jury for determination, the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and the credibility of the witnesses. Whether there was or whether there was not negligence on the part of the defendant company or of the plaintiff or both of them, are questions of fact to be determined by you in the light of all that the evidence has shown, tested by your judgment as practical men. In weighing the evidence and passing upon the credibility of the witnesses, you should take into consideration all that has been shown in the case, and the manner in which they have given testimony and their appearance before you, whether it inspired your confidence or whether to the contrary, it did not do so. You should take into consideration whether the witnesses have testified fairly, freely, openly and frankly, [64] just as you would expect a man to do who was trying to tell you what he knew, no more and no less, or whether they have been evasive, hesitating, held back, contradicted themselves, or whether, on the other hand, they may have been too willing or too free, and ran on to tell things not asked, and volunteered statements of testimony—what the law calls swift witnesses. Also, you will take into consideration the situation in which each witness was placed as enabling that witness to tell you the exact truth about a transaction, taking into consideration, the opportunities one witness may have had over an-

other of seeing exactly what took place. Also you will take into consideration the interest any witness may have shown to have had in the case, either by his relation to the transaction out of which the suit grew, or the manner in which he has given his testimony or his interest in the result of the case. The plaintiff and his wife, having testified in this suit for him, you will take into consideration the same rules and tests in weighing their testimony that you would to other witnesses, including their natural interest in the result of this suit.

Two forms of verdict have been prepared, one finding generally for the defendant, and one for the plaintiff with a blank in the event you should find for the plaintiff, in which you should insert the amount of damages. When you have agreed, you will notify the bailiff you have agreed and return the verdict into court.

Whereupon and before the jury retired to deliberate on their verdict, the defendant made the following exceptions to the instructions of the Court:

**[Exceptions to Instructions Refused.]**

Mr. OAKLEY.—Defendant excepts to the refusal of the Court to give defendant's instruction for a directed verdict.

Exception allowed. [65]

Mr. OAKLEY.—Defendant also excepts to the refusal of the Court to give defendant's requested instruction Number 9, as follows: "You are further instructed that if the plaintiff thought he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of



the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff, and he cannot recover and your verdict must be for the defendant," for the reason that the instruction covers the law applicable to the facts and the jury were not instructed on that point.

Exception allowed defendant.

Mr. OAKLEY.—Defendant further excepts to the refusal of the Court to give defendant's requested instruction 10 as follows: "You are instructed that if the plaintiff failed to look and listen, and stop, if necessary, or to take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then, and in that event, it was negligence on the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous proximity to the plaintiff," for the reason that this instruction correctly states the law applicable to the facts in the case and the jury were not instructed on this particular phase of the evidence.

Exception allowed. [66]

### **Verdict.**

Thereafter the jury returned into open court with a verdict in favor of the plaintiff for damages against the defendant in the sum of \$4,750.00.

And thereafter and on the 17th day of Dec. 1913, the defendant filed his motion for a judgment notwithstanding the verdict, as follows:



**[Motion for Judgment Notwithstanding Verdict.]**

Comes now the Tacoma Railway & Power Company, the defendant in the above-entitled action, and moves the Court that judgment be entered on behalf of the said defendant, notwithstanding the verdict rendered herein by the jury.

Said motion was duly argued before the Court on the 22d day of Dec. 1913, and after considering the same, the Court overruled said motion, to which ruling defendant excepted and exceptions were allowed.

And on, to wit, the 17th day of Dec. 4, 1913, defendant filed its petition for a new trial in the above-entitled action, requesting the Court to grant a new trial on the grounds in said motion set forth, and after consideration of said motion, after argument by the counsel for the respective parties hereto, said motion was on said 23d day of Dec. 1913, overruled, and denied, to which ruling defendant excepted and exceptions were allowed.

Now, therefore, in furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause, and prays that the same may be settled, allowed, signed and certified, by the judge as provided by law and filed as a Bill of Exceptions.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.

(Filed Jan. 9, 1914.)    [67]

**Defendant's Exhibit "A."**

Case No. 1335. United States District Court,  
Western District of Washington. Remmen vs. T. R.  
& P. Co. Defendant's Exhibit "A."

No. 8\*09.

Did you see the accident? Yes.

Where did it occur? It must have been 63d. I look  
for an embankment which was there & I noticed  
it. It was not very far from 64th.

What day and at what hour did this accident occur?  
December 7th, about 7 o'clock P. M.

Where were you when it occurred? If seated,  
where? If standing, where? 3 or 4th seat  
from rear of car on station side (left-hand side  
facing town).

Was car standing or moving at time of accident? If  
moving, about how fast? I judge about 12  
miles.

Was the bell or gong ringing at the time? No.

Who do you consider was to blame for the accident?  
Motorman.

What warning was given before accident? None.

Give knowledge of damage or injury done.

How far was object from car when first seen in a  
position of danger? As near as I could judge  
125 ft.

How far did car go before it stopped, after striking  
object? When I got out I noticed it was about  
2 car-lengths—I do not know length of a car.

State particularly how accident occurred. We got  
on at Fern Hill; we were on station side of car.

My wife had one foot on when our car started; she pulled herself on & car stopped at switch just beyond station. The condtor went [68] up to talk with motorman; when he came out he closed the double door, and it looked at the time as if he had been laughing. When conductor got back into car, I think we stoped at Alki switch. The doors worked open and motorman looked back into car and just as he looked back he gave one toot of whistle; nevertheless he kept looking back over his left shoulder and I could see *Reman* on track in glare of head light, it looked as it *Reman* was standing on track & yet motorman kept looking back. I could see over motormans shoulder and as motormans head was in the way I can only judge that *Reman* was about 125 ft. away. I could not see *Reman* after that. You would have thought that *Reman* was waiting for car, as I could see his shirt front. He was facing the car. Then car hit him. Motorman then stopped. I saw him throw off the power. I did not hear *Reman* say anything. I only went about 8 or ten feet from man. When on car he looked about half *concious*. When we got to town I asked the man his name, he said *Reman*. My wife did not see *Reman* on track, but saw the motorman looking back.

(Signed) J. E. TIMMERMAN.

March 8th, '13, 6:15 P. M.

Witness:

J. W. BROWNE.

(Filed Nov. 11, 1913.) [69]



**Order Settling Bill of Exceptions.**

Now, on this 30th day of January, 1914, the above cause coming on for hearing on the application of the defendant to settle the Bill of Exceptions in said cause, defendant appearing by F. D. Oakley and John A. Shackleford, its attorneys, and the plaintiff appearing by Fitch, Jacobs, and Arntson, its attorneys, and it appearing to the Court that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiff, within the time provided by law, and that certain amendments have been suggested thereto and that counsel for the plaintiff and counsel for the defendant have agreed as to the said amendments which should be made, and that both parties consent to the signing and settling of the same as amended, and it appearing to the Clerk that there has been filed with the Clerk of said Court a Bill of Exceptions which contains the amendments agreed upon by the parties, and that the same is in all other respects a duplicate of the proposed Bill of Exceptions filed by the defendant herein in this cause, and it appearing that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that the said Bill of Exceptions as amended by agreement contains all the material facts occurring in the trial of said cause, together with the exceptions thereto and all the material things and matters occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions and the Clerk of this Court is hereby ordered

and instructed to attach the same thereto;

Therefore, upon motion of John A. Shackelford [70] and F. D. Oakley, attorneys for the defendant, it is hereby

ORDERED, that said Bill of Exceptions as amended, filed on the 9th day of January, 1914, be and the same is hereby settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this Court who presided at the trial of said cause, as a true, full, and correct Bill of Exceptions, and the Clerk of this Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,  
Judge.

(Filed January 30th, 1914.) [71]

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### **Petition for Writ of Error.**

Comes now the defendant herein, Tacoma Railway & Power Company, and says that on or about the 13th day of November, 1913, this Court entered judgment herein in favor of the plaintiff and against the defendant in the sum of \$4,750, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant comes now by its



attorneys and prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals.

And the defendant further petitions this Honorable Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United [72] States in that behalf made and provided, and also that an order be made fixing the amount of security which this defendant shall give and furnish upon said writ of error, and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

J. A. SHACKLEFORD,

F. D. OAKLEY,

Attorneys for Defendant.

(Filed Apr. 16, 1914.) [73]

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### **Order Allowing Writ of Error.**

On this 16th day of April, 1914, came the defendant herein, Tacoma Railway & Power Company, by its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, and praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for



the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises, and said defendant having duly filed an assignment of errors intended to be urged by it and the court being advised in the premises,

IT IS HEREBY ORDERED, that a writ of error be and is hereby allowed, to have reviewed, in the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the judgment entered herein, and it is further ordered that the amount of the bond on said writ of error is hereby fixed at the sum of \$6,000.00, to be given by the defendant, and upon the giving of said bond, the judgment heretofore rendered will be superseded pending the hearing of said cause, in the Honorable Circuit Court of Appeals.  
[74]

IN WITNESS WHEREOF, the above order is granted and allowed, this 16th day of April, 1914.

EDWARD E. CUSHMAN,

Judge.

(Filed April 16, 1914.)    [75]

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**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, TACOMA RAILWAY & POWER COMPANY, a corporation, the defendant above named, as principal, and MARYLAND CASUALTY COMPANY, a corporation, organized under the laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the plaintiff in the above-entitled action, ELLING REMMEN, in

the sum of SIX THOUSAND DOLLARS (\$6,000.00), for which sum, well and truly to be paid to said Elling Remmen, his executors, administrators, and assigns, we bind ourselves, our and each of our successors, and assigns, jointly and severally, firmly by these presents.

SEALED with our seals this 22d day of April, 1914.

THE CONDITION of this obligation is such that whereas, the above-named defendant, Tacoma Railway & Power Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, and whereas, the said [76] TACOMA RAILWAY & POWER COMPANY, desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Tacoma Railway & Power Company, a corporation, shall prosecute said writ of error to effect, and answer all costs and damages awarded against it, if it shall fail to make good its plea, then this obligation shall be void; otherwise the Court may enter summary judgment against said Tacoma Railway & Power Company and said surety for the amount of such costs and damages awarded against said Tacoma Railway & Power Com-



pany, and this obligation to remain in full force and effect.

TACOMA RAILWAY & POWER COMPANY,

By JNO. A. SHACKLEFORD,

Its President and Attorney.

MARYLAND CASUALTY COMPANY,

By J. S. WHITEHOUSE,

Its Agent.

R. S. HOLT,

Attorney in Fact.

[Seal of Surety Co.].

Approved this 23d day of April, 1914.

EDWARD E. CUSHMAN,

Judge.

(Filed Apr. 22, 1914.)    [77]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record, etc.]**

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do, in pursuance of the command of the Writ of Error within, herewith transmit and herewith certify the foregoing to be a full, true and correct transcript of the record in the case of *Elling Remmen vs. Tacoma Railway & Power Company*, a corporation, lately pending in this District, as required by the stipulation of counsel filed in this case.

AND I further certify that attached hereto are the original Writ of Error, original Citation, and original Exhibits of Plaintiff 1, 2, 3, and 4, and original



Exhibit "B" of Defendant.

I further certify that the cost of preparing and certifying the foregoing transcript amounting to the sum of \$53.50 has been paid to me by the counsel for plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my official signature, and the seal of this Court, this 15th day of May, A. D. 1914.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk.

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**Writ of Error.**

**UNITED STATES OF AMERICA.**

The President of the United States of America, to  
Elling Remmen, Defendant in Error, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, or some of you, between Tacoma Railway & Power Company, a corporation, plaintiff in error, and Elling Remmen, defendant in error, a manifest error hath happened to the damage of said plaintiff in error, as by its answer appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things pertaining thereto, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Fran-

cisco, California, within thirty (30) days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [79] to be done, therein, to correct that error what of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of this Court, this 4th day of May, 1914.

[Seal]                      FRANK L. CROSBY,  
Clerk of the United States District Court, for the  
Western District of Washington.

By E. C. Ellington,  
Deputy Clerk. [80]

(Filed May 4, 1914.) [80]

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**Citation.**

**UNITED STATES OF AMERICA.**

The President of the United States of America, to  
Elling Remmen, Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said Court; in the City of San Francisco, and State of California, within thirty days from the date of this Citation, to wit, within thirty days from May 4th, 1914, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States, Western District of Washington, Southern Division, wherein Tacoma Railway & Power Company, a corporation, is plaintiff in error, and Elling Remmen, is defendant in



error, to show cause if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of this Court this 4th day of May, 1914.

[Seal] EDWARD E. CUSHMAN,  
Judge of the United States District Court for the  
Western District of Washington, Southern Division. [81]

We hereby acknowledge due and legal service of the above Citation on the therein named Elling Remmen, defendant in error, and the receipt of a true and correct copy thereof personally at Tacoma, in said District; on this 4th day of May, 1914.

FITCH, JACOBS & ARNTSON,  
Attorneys for Plaintiff.

(Filed May 4, 1914.) [82]

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[Endorsed]: No. 2424. United States Circuit Court of Appeals for the Ninth Circuit. Tacoma Railway & Power Company, a Corporation, Plaintiff in Error, vs. Elling Remmen, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received and filed May 23, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





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# In the United States Circuit Court of Appeals

For The Ninth Circuit

TACOMA RAILWAY & POWER COM-  
PANY, a corporation,

*Plaintiff in Error,*

VS.

ELLING REMMEN,

*Defendant in Error.*

No. 2424

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT  
COURT OF THE WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION.

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## BRIEF OF PLAINTIFF IN ERROR

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JOHN A. SHACKLEFORD,  
F. D. OAKLEY.

*Attorneys for Plaintiff in Error.*

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Stanley Bell Ptg. Co.

**Filed**

AUG 27 1914





# In the United States Circuit Court of Appeals

For The Ninth Circuit

TACOMA RAILWAY & POWER COM-  
PANY, a corporation,

*Plaintiff in Error,*

VS.

ELLING REMMEN,

*Defendant in Error.*

No. \_\_\_\_\_

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT  
COURT OF THE WESTERN DISTRICT OF WASH-  
INGTON, SOUTHERN DIVISION.

## BRIEF OF PLAINTIFF IN ERROR

### STATEMENT OF THE CASE.

This action was brought by the defendant in error to recover damages for injuries sustained by being struck by a street car while crossing the street car tracks of plaintiff in error, on South Yakima

Avenue in the City of Tacoma. The complaint alleges that "on or about December 7th, 1912, at about six P. M. of said day, the plaintiff was traveling southward on said South Yakima Avenue in the City of Tacoma, and upon arriving at about South Sixty-second Street plaintiff undertook to cross from the westerly to the easterly side of said avenue, and while plaintiff was upon said South Yakima Avenue, and in the exercise of due care on his own part, and endeavoring to pass from the westerly to the easterly side thereof, one of the street-cars of the defendant, which was being carelessly and negligently operated in a northerly direction on said South Yakima Avenue, *was so carelessly and negligently operated and handled by the employes of the defendant company in charge of the operation of said car that plaintiff was without warning run down, struck and injured by said car.*"

The only allegation of facts constituting negligence was the failure to give warning. The defendant in its answer denied the negligence complained of and affirmatively alleged contributory negligence on the part of the plaintiff in error, "in that while defendant's car was being operated on South Yakima Avenue, between 64th and 63d Streets, in the City of Tacoma, at a moderate and lawful rate of speed, plaintiff heedlessly, carelessly, recklessly, and unnecessarily placed himself in a position of great danger, to-wit, by walking or running across said street in close and dangerous proximity to defendant's car and striking and colliding

with said car; that plaintiff failed to exercise his mental faculties in any way to observe, escape, and avoid the risks and dangers of his position, which were open and apparent to him and could have been easily avoided; that he failed to take any care or precaution whatever to provide for his personal safety."

Plaintiff's version of how the accident occurred as incorporated in the Transcript of Record on pages 23 to 28, inclusive, is as follows:

"On the 7th day of December, 1912, I left my home at about half-past one o'clock and went downtown. I had sixty-five cents in money and paid five cents for car fare,—bought a glass of beer and then I bought fifty cents' worth of alcohol and then another glass of beer, at about five o'clock P. M. with my last nickel. I then started to walk home and was run down by a street-car. Plaintiff's Exhibits 1, 2 and 3 I recognize as photographs of South Yakima Avenue between 61st and 63d Streets. About the time I crossed 61st Street 'I seen a light that seemed like it was swinging on to the left,—striking to the left. I judged it to be on the Alki switch. They call it 65th Street switch on Yakima Avenue.' I thought the light was a car coming downtown, going in on to the switch. I was very close to the crossing or on it when I saw the light. I got a little further and a car came along at a good speed and passed me going from town, the same direction I was going. I might have been almost in the center of that block. Not any more. Just a little after she passed me I was about in the centre of the block, I heard a blast of the whistle because I took notice of it. I thought that was a car that was coming behind, a tripper, as I knew by the time of the night it was, and thought it was a signal to the car that swung in



first onto the switch for her to stop and wait until that tripper came up. When I heard the whistle I was halfway between the fence and 61st Street. I walked down until I got to a place where the sidewalk stops, at a place I marked 'X' on the photograph. *I started to walk across the street to the left as I could not go further on the sidewalk, and there was an orchard and the fence in front of me. As I started to cross the street I thought I heard something. I was satisfied that I heard a car coming from the direction of town, going south. At that time I was off the end of the sidewalk, out in the street. I kept on walking and looked around to see if I could see the headlight of the car. 'I thought I seen the headlight and also other lights, but I tried to get my eyes trained on it, fastened upon the headlight of the street-car and I did not see anything so close to me that I thought there was any danger, and so I straightened up again and about that time I was on the street-car track and as I glanced ahead I saw a very short distance from me a street-car, and I thought I could make it, and I tried to jump like this, and at the same time she struck me and she rolled me over and I landed on my arms underneath. I looked southward all the time I was walking on the sidewalk and saw no street-car up to the time I started to turn out across the street. There was a street light at the place I turned to go across and a path at that point. A street light is marked 'X' on the Exhibit 3. 'XX' shows location of Alki switch on Exhibit 3. Plaintiff's Exhibit One shows where I walked south on the sidewalk until I got to the fence that stands out in the street a good many feet, and passed the parking, and there is a well-trodden path over and across from here to here, indicating.*

When I looked towards the north, thinking I heard a street-car I was between the sidewalk and the end of the fence, started off the sidewalk. I

was walking across 'over to \* \* \* aiming to get to that sidewalk over there on the other side.' I do not remember anything further until two policemen picked me up in the car at the Inter-urban Depot. Someone said, Is he drunk? I said, I am not drunk; I am hurt. I was taken to the hospital and stayed there for seven weeks,—was attended by Dr. Love, surgeon for the defendant. I cannot do any work. Can walk possibly a block without a cane, but it is an effort, a very hard struggle."

#### CROSS-EXAMINATION.

(By Mr. OAKLEY.)

"The company took care of me at their expense. I was laid off for a few days before this accident, sick. I was canvassing for razor sharpeners for a few days before the accident. I have been taken to the police station in the patrol at different times for being intoxicated. It must be four and one-half miles from where I left 15th Street to the place where I was injured. It is a block from 61st Street to the fence. As I got to 61st Street I thought I saw a swinging light on the switch. I did not see any car, but the light must have been from the car. *I did not see a car at any time coming from the south, 'until she was as close as you are to me.'* My view was obstructed by the orchard and the fence.

Q. *Did you at any time from the time you went out back of that fence out into the street, look to see whether a car was coming from that direction or not?*

A. *No, sir. I looked the other way as I thought that I heard a car coming up the other way.*

Q. Where were you when you looked for the car coming the other way?

A. I was leaving the sidewalk to go out into the street.

Q. You were leaving this cement sidewalk?



A. The end of the cement sidewalk, yes, sir. Then I looked down towards Tacoma and thought I saw a headlight.

A. I tried to be sure of it and kept on walking and then turned around up the other way as I thought that car was not close enough to hurt me anyhow, and then I got my eye on this other car.

Q. *When did you hear the blast of the whistle?*

A. *Probably one-half way between 61st Street and the fence.*

Q. *Where did that come from?*

A. *It sounded from the south, Alki switch.*

Q. *You heard the blast of a whistle halfway between 61st Street and the fence?* A. *Just about.*

Q. *Then you knew the car was coming?*

A. *I thought the car was going to stay there on account of another car coming up.*

Q. You knew what the blast of the whistle of a street-car means? A. I thought it meant to stop.

Q. Did you ever hear a street-car give a whistle when it was going to stop?

A. For another car behind it.

Q. Why did you look towards the city when you heard the whistle at Alki switch?

A. I thought there was a tripper behind the one coming on south. I thought the car was coming and was going to stay there on account of another car coming up. I thought the whistle meant to stop. I looked towards the city when I heard the whistle at Alki switch, because I thought there was a tripper behind the one coming on south.

Q. You did not pay any attention at all to the whistle? A. I did, sir.



Q. What did you do?

A. I looked for the car coming.

Q. Did you look in the opposite direction?

A. I did, sir, because I thought this meant for the car coming from the opposite direction.

Q. What kind of a whistle?

A. Just one short blast. I think the edge of the fence is twelve feet from the street-car track.

Q. Where were you when you were hit by the street-car?

A. I must have been between the two tracks, and when the \* \* \* I seen the car and made a jump and got just about to the east track there. When I first saw the street-car that struck me it was ten feet away, and I was about the middle of the car track. I was struck right opposite this fence. The right side of my body was struck by the car. I could not say it was the side or end or what part of the car struck me. I did not know anything about the fender of the car. I did not see any headlight on the car. After I left 38th Street it was raining a little drizzle."

Mr. Polley, one of plaintiff's witnesses, testified that he was walking along the street near the place of the accident, and testified: "The car was about 100 feet from the plaintiff when I first saw him. I yelled just as it struck him. Just before the car reached him I saw the plaintiff going from the sidewalk near the fence, which projects about 12 feet out. When I heard the car coming I turned around and saw that the car was about 100 feet from Mr. Remmen, who was coming onto the tracks. He was on the track when I turned

my head again,—just going to stop and step off the track. *I had no trouble in seeing or hearing the car.* He was looking towards 56th Street.” This, we will state in passing, was in the opposite direction from that in which the car was coming.

Mr. Zimmerman, one of plaintiff’s witnesses, testified that the front door of the car was partly open,—he could see the motorman looking back into the car and testified further on as follows:—  
(R. 33-34) :

“When I first saw Mr. Remmen the car was anywhere from 100 to 125 feet from him. I thought he was waiting for the car. He was on the right side of the car,—‘on the right side as you come down,—the proper place for anyone to wait for it.’ I was seated two seats from the rear of the car, not counting the one that runs lengthwise of the car. The plaintiff was facing to the south when I saw him, what would be towards 61st Street. I could see the ‘V’ of his vest and his shirt front. From appearances the way he was standing he seemed to be looking towards the car. I could not see his head. I did not hear a whistle at any time. I could see a bright headlight ahead. I was looking at the motorman. I did not see Mr. Remmen move after the first time I saw him. I could not say whether it was the front or side of the car that hit him.”

After the accident he was taken to a hospital by one of the city jailers, who testified as follows  
(R. 36) :

“I am one of the city jailers and am acquainted



with the plaintiff. I saw the plaintiff at the Inter-urban Depot. We took him out of the car and took him into the city ambulance or patrol wagon up to the hospital. I assisted in getting him out of the car. He was intoxicated. I have seen him in the city jail perhaps four times for being intoxicated. I have seen him paralyzed drunk and have seen him to the extent of having delirium tremens. He has been in the city jail since the accident."

And Miss Erickson, the nurse who attended him, testified as follows (R. 36):

"I am a nurse in the Tacoma General Hospital, and was so employed on the 7th day of December, 1912. I saw plaintiff when he was brought in after the accident. I think he was intoxicated. He was very noisy and his breath smelled of liquor. He was boisterous. For about an hour or so I had trouble taking care of him."

And Dr. Love, the first physician to see him, said that plaintiff had been intoxicated. (R. 41-42).

Mr. Payne, the motorman in charge of the street-car, testified (R. 37-40):

"I seen a man run out from the sidewalk; when I first seen him he was about eight feet from the car, from the side. He appeared as though he wanted to catch the car. I was inbound, this side of 64th street, between 64th and 63d streets, and when I seen him I tooted the whistle, and he started to step out and he struck the car somewhere about the center of the car. The street light was out at 63d street and I saw him when he come into the rays of the light of the car. 'I seen him come staggering through the mud towards the car and he struck, as near as I could tell by looking in the glass from ten to fifteen feet from the rear of the car, and went backwards into the mud, and then



he went out of my view in the glass and I stopped about a car and a half-length or two car-lengths from where he fell. The car did not stop at 64th Street, which is about 100 or 150 feet from Alki switch,—the car was traveling at about ten or twelve miles per hour. The car was about 50 feet long, with back vestibule on both ends with center posts, with two folding doors inside the entrance on both ends of this car. The doors were closed and hooked. I know positively the conductor tried to get out at Alki switch to get through the head end in order to put the trolley on and the doors were hooked and I did not open them. The doors were opened last at Fern Hill when I hooked them there. The curtains obstructed the view of all passengers who could not see into the vestibule. The curtains pull down on the inside of the car and the curtains are used to keep the light out from reflecting on the window so you can see ahead and see around. If these curtains are up the light would reflect on the windows and you could not see past the windows. It is absolutely necessary to have the curtains pulled down. I could not see where the conductor was on account of the curtains, but I could hear the register ringing. He was collecting fares. I was not looking back into the car after leaving 64th Street. I was looking straight ahead. The front slide window was down. There were people standing at 64th Street but we did not stop, I let the car following us pick them up. This car was three or four car-lengths behind us. When Mr. Remmen was struck our car had gone about three-quarters of a block beyond 64th Street, and at the point in front of Mr. Barrett's house. When I first saw Remmen he was staggering towards the car. To the right of the car in the street. He was out in the traveled road about six or eight feet from the car track. I was then about a car-length from him when he came out of the road onto the track when I first saw him. I then started to stop. I blew the whistle as soon as I

saw him. There is a mirror which is fastened on the side of the vestibule of both ends. On both ends of the cars which have double ends, set at an angle so that a motorman can look into it and see everything at the rear of the car within six or eight feet from the car. I saw Mr. Remmen through this mirror hit the car and take a couple of staggering steps and then fall out of my view. There are step lights on the car, one in front and one back of the car. These lights show everything up so you can see everything between the mirror and the rear light on the step. The car had fenders on both ends. If a man was struck by one of these fenders it would pick him right up. Mr. Remmen was not struck by a fender. After I saw him hit the side of the car I stopped immediately, jumped out of the car and ran over to where he was. I was the first one there. He was lying on his back in the mud, about four feet or five feet from the track. I stooped over to pick him up and his breath smelled strongly of liquor. When I stopped the car the front end of the car was at about 63d Street, and he was about two car-lengths back from 63d Street. About in front of Barrett's house. Mr. Barrett telephoned from his house for the city ambulance. The headlight in the car was lighted at the time and in good condition."

Mr. E. J. Beacher testified as follows (R. 42-43) :

"On the 7th day of December, 1912, I was living at Parker Street on the Spanaway line and was a passenger on the car on the night of the accident. I got on at Fern Hill and was standing on the back platform next to the entrance and as we passed 64th Street, I looked out and looked ahead to see where we were. I was intending to get off at 61st Street, and just as I looked out I saw a man very near the side of the car, and a second later he was up against it and when we hit him



it turned him around a couple of times, and he lit on his back in the mud, about the middle of the street. He was still standing when we passed him. I was right on the back platform, right at the entrance. When I first saw the plaintiff he was right alongside of the car and then within two or three feet of it. The front end of the car had passed him. The car went about 100 feet after Mr. Remmen fell. I had lived within four blocks of this place for about two years and am familiar with the location of everything there. Mr. Remmen struck the side of the car about halfway back and after the rear end had passed him he fell. I saw him just as he lit in the mud. The car was traveling fifteen miles per hour, not more. Mr. Remmen fell about 100 or 150 feet from 63d Street. I then rode on the car to 61st Street and got off."

We call the court's attention particularly to plaintiff's Exhibits 1, 2 and 3, which are photographs showing the street at the point of the accident. The defendant operated a single track car line at this point and as shown by the above exhibits a fence projected out into the street some considerable distance from the cement walk; this fence, together with an orchard which it enclosed, obstructed the view of pedestrians on that side of the street to the south. Plaintiff's contention is that he was walking south and upon coming to this fence started to cross the muddy road to the opposite side of the street, without looking to the south to ascertain whether or not a car was approaching. Defendant's witnesses, including a city police officer and his daughter, testified that the accident occurred nearly a block south of this corner,



in front of the police officer's house. Defendant's Exhibit "B" is a map showing the exact measurements of all material points involved in the controversy.

At the close of the evidence plaintiff in error made a motion for a directed verdict, in favor of the defendant, on the several grounds as shown on page 49 of the Record, which motion was overruled, after which the case was submitted to a jury, which returned a verdict for the plaintiff in the sum of \$4750.00. Defendant thereafter made a motion for a new trial which was overruled, and this Writ of Error was thereupon obtained.

## ASSIGNMENTS OF ERROR.

### I.

The Court erred in refusing to give defendant's requested instruction as follows:

"You are instructed to bring in a verdict in favor of the defendant."

For the reason that the evidence failed to disclose any negligence on the part of the defendant company, and showed conclusively that the plaintiff was guilty of contributory negligence.

### II.

The Court erred in refusing to grant defendant's motion for a directed verdict in favor of the defendant on the following grounds therein set forth:

1. That the evidence has failed to disclose any negligence on the part of the defendant company; the evidence has failed to show that the car was being operated at an excessive and unlawful rate of speed.

2. That the evidence fails to show any grounds for the submission of the case to the jury on the ground of the last clear chance. It is not an issue in this case, and there is no evidence to show that the motorman in charge of the car in controversy failed to exercise ordinary care after he discovered the plaintiff's dangerous position on the track, or near the track.

3. The evidence shows that the plaintiff himself was negligent in not using his senses in any way whatever to ascertain the approach of defendant's car; that he failed to either look or listen or otherwise inform himself as to whether a car was approaching at the time he stepped upon the track, if he did step upon the track; that, had he looked, he could have seen the car, and was guilty of contributory negligence in failing to look or listen.

### III.

The Court erred in refusing to grant defendant's motion for a judgment notwithstanding the verdict, for the reason that the verdict was contrary to the instructions and was not based upon sufficient evidence to support the same; that the

evidence failed to disclose any negligence on the part of the defendant company, and showed that the plaintiff was guilty of contributory negligence.

#### IV.

The Court erred in overruling defendant's petition for a new trial on the grounds therein set forth.

#### V.

The Court erred in refusing to give defendant's requested instruction number nine as follows:

"You are further instructed that if the plaintiff thought he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff and he cannot recover, and your verdict must be for the defendant."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

#### VI.

The Court erred in refusing to give defendant's requested instruction number ten, as follows:

"You are instructed that if the plaintiff failed



to look and listen, and stop, if necessary, or to take any reasonable precaution whatever to ascertain whether a car was coming upon the track of the defendant company, then and in that event it was negligence upon the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous distance of the plaintiff.”

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

## ARGUMENT.

PLAINTIFF IN ERROR CONTENDS THAT THE DEFENDANT IN ERROR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN WALKING UPON THE STREET CAR TRACKS UNDER THE CIRCUMSTANCES SHOWN BY THE EVIDENCE IN THIS CASE.

In the statement of the case hereinabove set forth the testimony material to the determination of the questions involved has been called to the Court's attention and we will not repeat the same to any extent. If we accept defendant in error's version of the case it must be considered that when he left the sidewalk his vision was obscured by a fence and an orchard which extended several feet out into the street, and he could not see along the track in the di-

rection from which the car was coming which struck him. He knew that a car was coming from that direction and did not look that way, but rather to the opposite direction. He paid no attention to the blast of the whistle which he heard from the car coming from the south.

“Q. When did you hear the blast of the whistle?

“A. Probably one-half way between 61st street and the fence.

“Q. Where did that come from?

“A. It sounded from the south, Alki switch.

“Q. Then you knew the car was coming?

“A. I thot the car was going to stay there on account of another car coming up.

“Q. You know what the blast of the whistle of a street car means?

“A. I thot it meant to stop.

“Q. Why did you look toward the city when you heard the whistle at Alki switch?

“A. I thot there was a tripper behind the one coming on south. I thot the car was coming and was going to stay there on account of another car coming up. I thot the whistle meant to stop. I looked towards the city when I heard the whistle at Alki switch because I thot there was a tripper behind the one coming on south.

“Q. You did not pay any attention at all to the whistle?

“A. I did, sir.

“Q. What did you do?

“A. I looked for a car coming.

“Q. Did you look in the opposite direction?

“A. I did, sir. Because I thot this meant for the car coming from the opposite direction.

“Q. What kind of a whistle?

“A. Just one short blast. I think the edge of the fence is 12 feet from the street car track.”

It cannot be said then that he did not know that a car was approaching on the track coming from the south, because he said himself that he knew the car was on the track,—he heard one short blast of the whistle, but instead of looking in the direction from which he knew the whistle came, he looked in the opposite direction, and said he thot he saw a street car a great many blocks from him towards the city. His only excuse for not paying any attention to the warning blast of the whistle, was that he thot it meant for the car to stop.

We have heretofore called the Court's attention to the fact that the only allegation of negligence on the part of the defendant company alleged in the complaint, was its failure to give warning, and we submit to the Court that the above testimony of the plaintiff himself shows that he had warning of the fact that a street car was coming from the south, because he specifically stated in a number of places



in his testimony shown in the Record that he heard the whistle of a car coming from that direction.

It would seem unnecessary in the light of this evidence to go into any lengthy discussion to satisfy the Court that the defendant in error was guilty of contributory negligence in walking out from behind an obstruction after having heard the blast of a whistle of a street car, which he knew was coming from the south, without looking toward the south or otherwise using his senses after he had passed the obstruction, to ascertain whether or not the car from which he knew the blast of the whistle came, was in the vicinity of the place which he was attempting to cross. He was not crossing the street at any crossing place. The exhibits show too conclusively the character of the street at this place for anyone to honestly entertain the opinion that this was a crossing used by the public. The testimony shows that the road was in a wet and muddy condition, impassable to anyone who did not wish to flounder around in the mud. The headlight of the street car was burning. There was no allegation and no proof offered to show that the car was traveling in excess of any speed ordinance of the city, or that it was traveling at any dangerous or excessive speed. The evidence, on the contrary, shows conclusively that the car was being operated at a very moderate rate of speed.

The Courts have in many cases held that a person is guilty of contributory negligence (a) *where be-*

fore going upon street car tracks he fails to exercise his senses to discover the approach of a car, (b) where he so carelessly looks or listens that he does not see an approaching car plainly visible for some distance, (c) where he looks only when some distance from the track and does not look again before attempting to drive upon the track, (d) where he emerges suddenly from behind a standing car or other object which obstructs his view and suddenly goes upon the track.

*Christensen v. Union Trunk Line*, 6 Wash. 75,  
32 Pac. 1018.

*Helber v. Spokane St. Ry. Co.*, 22 Wash. 319,  
61 Pac. 40.

*Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80  
Pac. 525.

*Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81  
Pac. 830.

*Davis v. Railroad Co.*, 47 Wash. 301, 91 Pac.  
839.

*Skinner v. Tacoma R. & P. Co.*, 46 Wash. 126,  
89 Pac. 488.

*Helliesen v. Seattle Elec. Co.*, 56 Wash. 278,  
105 Pac. 458.

*Borg v. Spokane Toilet Supply Co.*, 50 Wash.  
204, 96 Pac. 1037.

*Dimuria v. Seattle Transfer Co.*, 50 Wash. 633,  
97 Pac. 657.

*Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118  
Pac. 51.

*Slipper v. Seattle Elec. Co.*, 71 Wash. 279, 128 Pac. 233.

*Armstrong v. Spokane & Inland Empire Ry.*, 71 Wash. 624, 129 Pac. 379.

*Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058.

*Bardshar v. Seattle Elec. Co.*, 72 Wash. 200, 130 Pac. 101.

*Mey v. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283.

*Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983.

*Beeman v. Puget Sound Traction, Light & Power Co.*, 37 Wash. Dec. 107, 139 Pac. 1087.

*Bowden v. Walla Walla Valley Ry. Co.*, 137 Wash. Dec. 144, 140 Pac. 549.

*Brown v. P. S. E. Ry.*, 76 Wash. 214, 135 Pac. 999.

In *Criss vs. Seattle Electric Company*, 38 Wash. 320, 80 Pac. 525, *supra*, plaintiff was struck by a street car while walking diagonally across the track at a crossing of business streets in the City of Seattle, driving a team of horses before him, in the evening after dark. The testimony showed that he saw and heard a street car approaching down a steep grade one block away before he started to cross the track. There was nothing to prevent his looking back and seeing the car as it approached, but the testimony showed that he paid no attention



to the car until it was upon him and too late to get out of the way. The Court, in holding plaintiff to have been guilty of contributory negligence in failing to pay any attention to the car when knowing of its approach, said:

“He had every opportunity to see the car in the dark. The motorman had no opportunity to see the respondent until he came within the rays of the headlight. Under these circumstances, we think there is no escape from the conclusion that the respondent’s own negligence contributed to the injury.”

In *Mey vs. Seattle Electric Company* 47 Wash. 497, 92 Pac. 283, *supra*, a pedestrian was held guilty of contributory negligence precluding a recovery in walking on a street car track in a city where cars were constantly passing, at a point where the sidewalk and part of the street was fenced off or taken up with building operations, where there was room, every few feet, for him to get off of the track to allow a car to pass, and he failed to keep on the lookout for cars coming behind. In that case the Court said:

“It seems plain that it was the duty of the appellant, while traveling in close proximity to this track in a place where he testifies he knew that cars were passing at short intervals, to have exercised the ordinary caution of noticing, when he passed those points where there was not room for both man and car, whether there was any car which was liable to injure him. *According to the testimony, the track was on an open, paved street where the slightest observation would have discovered the approach of a car. Not having exercised this ordinary*

*caution, we think the plaintiff was undoubtedly guilty of contributory negligence."*

The cases of *Bork vs. Spokane Toilet Supply Co.*, 50 Wash. 204, 96 Pac. 1037, *supra*, and *Dimuria vs. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, *supra*, involve collisions between vehicles and pedestrians, but it is submitted that there is no reason why the law announced in those cases should not apply to the case at bar. It is a matter of common knowledge that street cars travel faster and are stopped with more difficulty than are vehicles drawn by horses, and for that reason pedestrians should be charged with greater care to avoid a collision with street cars than with other vehicles.

In the Borg case a pedestrian was crossing a city street diagonally in the middle of the block, and was struck by a delivery wagon. He saw the wagon approaching at six or eight miles an hour as he stepped from the curb, but paid no further heed to it, supposing it would keep on its course. There were no other vehicles in the street, and he met the wagon at right angles, while the same was crossing to the other side of the street. In holding the pedestrian guilty of contributory negligence, the Court said:

"Under these facts there can be no question that the driver of the laundry wagon was guilty of gross and inexcusable neglect; but we see no escape from the conclusion that the appellant was equally negligent, though perhaps the consequences of his neglect were not likely to prove so serious to others. The speed of the laundry wagon did not exceed six or eight miles per hour; there were no other vehicles in



the street to distract or bewilder the appellant; he was in full possession of all his mental faculties, though apparently utterly oblivious to his surroundings. Both parties had equal rights in the street, and each rested under the same obligations to look out for his own safety and the safety of others. Had the appellant been the superior force in this instance, causing injury to the respondent or to some third person, there could be no question as to his negligence."

In the *Dimuria* case a pedestrian was run down by a team at a crossing. It appeared that he held an umbrella over his head in such a position as to prevent his seeing the approaching team, and neither before nor while crossing the street did he look in either direction for teams or vehicles. If he had done so he could have seen the team. The Court, in holding the plaintiff guilty of contributory negligence as a matter of law, said:

"There is no evidence that the respondent, before or while crossing Jackson Street, looked in either direction for teams or vehicles, or that he took any precaution for his own safety. *It was just as much his duty to do this as it was the duty of the driver to exercise care in avoiding accident. Pedestrians and teams have not any superior rights the one over the other at street crossings. They each have a common right to use the street, and in its exercise are equally bound to employ care for their personal safety. Barker vs. Savage, 45 N. Y. 191, 6 Am. Rep. 66; Borg vs. Spokane Toilet Supply Co., ante p. 204, 96 Pac. 1037.*

"From all the evidence we are compelled to hold that the respondent was guilty of contributory negligence, as a matter of law, in failing to look for approaching teams or to take any other precaution



for his personal safety; that the trial Court erred in denying appellant's motion for a non-suit; that the defect in respondent's case was not cured by evidence subsequently admitted; and that the appellant is now entitled to have its motion granted on this appeal."

The case of *Skinner v. Tacoma Railway & Power Co.*, 46 Wash. 122, 89 Pac. 488, *supra*, it is submitted is squarely in point. There a pedestrian 81 years old was held guilty of contributory negligence as a matter of law in stepping, on a dark night, in front of an approaching street car ten feet away, with its headlight burning, where a car bound in the opposite direction had passed and he knew that the cars were accustomed to meet there, where the approaching car was in open view for a considerable distance, while he was picking his way slowly across the mud and water in the street, without either hearing or seeing the car. In that case the Court said:

"There certainly can be no doubt that the respondent was guilty of contributory negligence when he deliberately walked in front of appellant's car. The respondent knew that the cars usually met upon that block. He was familiar with their running time. He saw the south-bound car pass. The night was dark, no lights nearby except the light of the car. Yet he carelessly walked upon the track within ten feet of an approaching car with all its lights burning. *He stepped directly into the rays of the headlight of the car. There was nothing to obstruct his view. We think there can be no dissenting opinion that this was negligence which caused his injury. The trial Court should have, therefore, refused to submit the case to the jury. Coates v.*

*Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Criss vs. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 87 Pac. 1058."

In *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, a pedestrian was struck at night at a crossing, by a well-lighted street car. She testified that just a moment before stepping on the track she looked east, and saw no car and heard no bell. It appeared that if plaintiff had looked as she said she did she must have seen the lighted car about 40 feet east of the crossing, going at a speed of ten miles an hour, the speed at which the consensus of opinion of the witnesses fixed the approach of the car. Whether or not the gong was sounded was a disputed question of fact. Respondent had lived upon the car line for some eight months, and knew that cars passed there frequently in both directions. In holding plaintiff to have been guilty of contributory negligence, the Court said:

*"We cannot understand how one looking for a car can fail to see a lighted car with its headlight throwing on the track ahead of it, and only forty-two feet away. The physical facts of the situation are a unit in showing respondent could not have used ordinary care in attempting the crossing. If she looked she must have seen the car, or else she gave such an indifferent and casual glance as was of no value to her in determining whether or not a car was approaching. In either event she was not using ordinary care. The car was there with its lights burning, and such a look as would be given by an ordinary prudent person would have located it. Pedestrians in crossing the tracks of a street railway in the*



daytime or in the night-time, knowing as respondent knew that the crossing was one where cars frequently passed, must use their senses to apprise them of danger, if any; they cannot heedlessly and carelessly cross the track, and throw the entire burden of their safety upon the motorman of any approaching car. The rights of the pedestrian and those of the street railway are equal. Their duties are reciprocal. Neither has the exclusive right of way; each must have due regard to the rights of the other.

“It is urged by respondent that, if it should appear that she attempted the crossing without looking and without listening, such failure is not contributory negligence, in law; citing *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184, and other cases from this court, in which it is held that failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not the exclusive right of way, is not negligence *per se*. *Such is undoubtedly the rule here, but such a rule does not mean that one can heedlessly and carelessly cross the track without using his senses for his protection; nor does it mean that those who have eyes to see, but see not, and ears to hear, but hear not, are exercising due care.* In determining the question of contributory negligence, due care or ordinary prudence is the only known test. What would be due care under certain circumstances would not be due care under other and different circumstances; and in determining this question this court has refused to predicate its answer alone upon the fact that it did not appear that the person about to cross the track looked or listened, and say such failure of itself alone constitutes negligence in law. Other facts existing and present and affecting the situation must be given their due weight in determining the question of contributory negligence. In other words, it is not alone, Did the pedestrian look and listen? and, upon answering that question in the



negative, say it is negligence *per se*, and there can be no recovery. But the test is, Did the pedestrian, under all the circumstances, use such a degree of care, caution and prudence as an ordinary, prudent, and careful pedestrian would use under like circumstances?; and, in answering such test, this court has in a number of cases held that the failure to look and listen was a fact to be considered in determining whether or no there was contributory negligence as a matter of law. *Skinner v. Tacoma Railway & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Mey vs. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 67 Pac. 657. The same rule has been applied to the drivers of wagons in crossing the track. *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Coeur d' Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839; *Helber v. Spokane St. Ry. Co.*, 22 Wash. 319, 61 Pac. 40. The Roberts case cites an authority for the rule therein announced: *Robbins v. Springfield St. R. Co.*, 165 Mass. 30, 42 N. E. 334, and *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902. An examination of the Massachusetts and Minnesota cases will show that the announcement of such a rule was never intended to be construed as holding that failure to look and listen was not a circumstance to be considered in determining the question of contributory negligence, as a matter of law. We refer to a number of such cases subsequent to the Robbins case."

And, after an exhaustive review of the authorities of Massachusetts and Minnesota, the court concludes:

"Cases might be multiplied holding a like rule. We have, however, confined our citations to those states following which this court first pronounced

the rule in the Roberts case, and our purpose in doing so is to make clear that this rule in the Roberts case does not announce a rule of conduct that may be used as a measuring stick in all cases, irrespective of the facts, which must alone determine its proper announcement.

“In the present case, it conclusively appears to us that, *if the respondent looked as she says she did, she must have seen the car, then only forty-two feet away. If she did not look, under all the attendant circumstances, she was not using due and ordinary care.* In either case she was guilty of contributory negligence, and she cannot recover.”

In a concurring opinion, Gose, J., adds:

“There is a photograph in the record, the accuracy of which is not disputed, which shows that the car which struck the respondent could be plainly seen, from the place where the accident occurred, for a distance of about five hundred feet. There must of necessity be reciprocal duties upon the pedestrian and the street railway company. *The track itself is a danger signal, and the pedestrian cannot be absolved from using the care which ordinary prudence demands. Under the circumstances admittedly present in this case, the act of the respondent in starting to cross the track was gross negligence.* The verdict of a jury will not be permitted to control physical facts. In concurring, I assume that there was competent evidence from which the jury might find that the motorman did not ring the bell after leaving Summit Avenue, *but it does not follow that the respondent could step in front of a well-lighted, moving car so near her that she could not withdraw her foot in time to avoid being struck by it, without being guilty of such negligence as to preclude a recovery. If she can recover in this case, a right of recovery could not be denied her if she had been a second later*



*and had been injured in colliding with the body of the car."*

In *Fluhart v. Seattle Electric Company*, 65 Wash. 291, 118 Pac. 51, the plaintiff started to cross the street from his house to the opposite side of the street for the purpose of reaching the barn where he kept his horses. He walked across the street until he was six feet from the street car tracks, at which point he looked for a car, but, seeing none, he started on across the track without looking again, and was struck by a car, which he testified he never saw. The court in holding the plaintiff guilty of contributory negligence, as a matter of law, in failing to exercise his faculties to discover an approaching car before stepping upon the tracks, said:

"From this evidence and the undisputed situation it unquestionably appears respondent walked too close to the track after he saw the approaching car, or at least after he could have seen it in the exercise of ordinary care. *The fact that the motorman operated the car at a dangerous and unlawful rate of speed, although negligence, would not entitle respondent to a recovery if he was also negligent and his contributory negligence was the proximate cause of the accident.* If, as he says, he looked west toward the approaching car when he was half-way from the curb to the track, he did so when he was within seven feet of the track. Thereafter he could not have proceeded more than two or three ordinary steps. He had not reached the track when struck. It is unreasonable to accept the theory that he could see to the top of the hill at Queen Anne Avenue to the east, and yet, within two or three steps of the track, could not see far enough west, aided by a brilliant headlight, to observe that the car would



probably strike him before he reached the track, as he 'was moving right along.' If the fog was so dense he could not see an approaching headlight, in time to avoid being overtaken, while walking only two or three steps, he was inexcusably negligent and reckless in 'moving right along' toward the track without using his other senses to learn existing conditions and assure himself of safety.

"In principle this case does not materially differ from the rule announced by this court in *Skinner v. Tacoma R. & R. Co.*, 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, and *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471. Respondent was not at a street crossing, although but a few feet distant therefrom. If it was too foggy for him to see a car he should have realized it would be too foggy for a motorman to see him before he unexpectedly appeared upon or near the track. When he approached the track, the duty of exercising due care rested upon him. The street was not thronged with pedestrians, vehicles, or cars which might distract and confuse him. There were no pedestrians other than himself at the immediate scene of the accident, and the offending car was the only vehicle then shown to be upon the street. *Being familiar with the location, respondent should have been able to apprise himself of the approach of the well-lighted car over an unobstructed street, and could have done so had he exercised ordinary care and prudence. There was neither necessity nor excuse for stepping in front of the car, even though it was approaching at an unlawful speed. Negligence on the part of the appellant did not relieve respondent from the duty of exercising care and avoiding contributory negligence on his part. Although respondent says he did not see the approaching car, it is manifest he could have observed it, as he did see the further track was clear as far as the hill at Queen Anne Avenue. Instead of looking west after looking east, and before pro-*

ceeding, he walked right on and was struck before turning his head."

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"In the Skinner case, *supra*, the plaintiff, a man 81 years of age, was held guilty of contributory negligence as a matter of law by reason of the fact that on a dark night he stepped in front of a well-lighted approaching car. *The physical and undisputed facts in this case indisputably show respondent must have done substantially the same act, by stepping too near the track in front of a rapidly approaching and well-lighted car. Evidence of physical facts making it certain a pedestrian must have seen, or could have seen an approaching car had he looked, renders unavailing his unsupported statement that he did look, but could not see. Oral statements, although undisputed, must yield to undisputed physical facts and conditions with which they are irreconcilable. From the physical facts and respondent's evidence, it is apparent he recklessly, carelessly and negligently walked too near the approaching car, and that in so doing he was guilty of contributory negligence.*"

We call the court's attention particularly to the case of *Beeman v. P. S. T. L. & P. Co.*, 37 Wash. Dec. 107, 139 Pac. 1087, decided by the Supreme Court of the State of Washington, April 15th, 1914,—a case almost parallel with the one in issue. In that case the "plaintiff approached a crossing on one of the streets in the city of Seattle. When about to step from the sidewalk he looked up the street and saw a street car about 450 feet away. The car was coming toward him and was moving at a rate of speed alleged to be and which the jury found to be approximately thirty miles per hour. The headlight of the car was lighted. The cross-



ing was muddy,—plaintiff was engaged in picking his way across the street when he was struck by the car and injured.” The court after referring to several decisions from other courts, used the following language:

“Coming to our own cases, we cannot escape the logic of the holding of this court in the case of *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392:

‘It is clear that the car was much nearer the appellant when he entered the street and when he looked the second time, than he estimated it to be; and while he may have concluded that he had plenty of time to cross in front of it, he did not in fact have sufficient time, and did not verify his estimate by taking a look immediately before he entered the place of danger. His injury was clearly, therefore, contributed to by his own negligence. \* \* \* By stopping at any time before he reached the railway track, the appellant would have been in a place of safety, and for one in his situation, knowing as he must have known had he looked in the direction of the car that it was almost upon him, to stop before attempting to cross the track would have been the exercise of only ordinary prudence and care. A motorman has the right to assume that a person on the street will exercise such care to avoid injury, and he may lawfully act on that assumption, until the conduct of the person warns him to the contrary.’

“This is in line with what has been said in *Hellesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, where the liability of the street railway companies to a pedestrian who should have seen an approaching car was considered. It was there contended that the injured party was justified in attempting to cross a street without looking and



without listening, under the authority of the case of *Roberts v. Spokane St. R. Co.*, *supra*. The rule was admitted, but the court said:

‘Such a rule does not mean that one will heedlessly and carelessly cross the track without using his senses for his protection; \* \* \* What would be due care under certain circumstances would not be due care under other and different circumstances; and in determining this question this court has refused to predicate its answer alone upon the fact that it did not appear that the person about to cross the track looked or listened, and say such a failure of itself alone constitutes negligence in law. Other facts existing and present and affecting the situation must be given their due weight in determining the question of contributory negligence. In other words, it is not alone, Did the pedestrian look and listen? and upon answering that question in the negative, say it is negligence *per se*, and there can be no recovery. But the test is, did the pedestrian, under all the circumstances, use such a degree of care, caution, and prudence as an ordinary, prudent and careful pedestrian would use under like circumstances; and in answering such test, this court has in a number of cases held that the failure to look and listen was a fact to be considered in determining whether or no there was contributory negligence as a matter of law. \* \* \* The *Roberts* case cites as authority for the rule therein announced; *Robbins v. Springfield St. R. Co.*, 165 Mass. 30, 42 N. E. 334, and *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902. An examination of the Massachusetts and Minnesota cases will show that the announcement of such a rule was never intended to be construed as a holding that failure to look and listen was not a circumstance to be considered in determining the question of contributory negligence as a matter of law. We refer to a number of such cases subsequent to the *Robbins* case.’

"When respondent was about to step on the track, the car must have been only a few feet away, with its head light burning, and it would seem that his responsibility should be measured by the rule laid down in these cases and those cited in the *Helliesen* case. Then, too, it seems impossible to distinguish this case from the case of *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488, for the real question is not to be resolved by reference to the fact that respondent saw the car when four hundred and fifty feet away and walked blindly under the cloak of a presumption; but, rather, should he have seen the car when he stepped on the track, considering its immediate proximity, and the facts and circumstances then existing and immediately preceding. To hold otherwise, would be to say that a pedestrian, having knowledge, is not bound to sense the possibilities that attend known facts and may go at will, relieved of responsibility. Nor do we understand that this doctrine is denied in the *Richmond* case. It is there said:

'Of course, it can be said that he was required to use his senses and exercise such care as a man of ordinary prudence would be expected to exercise under such circumstances.'

"What is the meaning of 'such circumstances?' Certainly it does not mean that a man who knows that a car is approaching is to be bound by the same rule as one who does not know it, and who, under the facts, is not necessarily bound to know it."

The court held plaintiff guilty of contributory negligence and reversed the judgment of the lower court with directions to dismiss the action.

In the case of *Bowden v. Walla Walla Valley*



*Ry. Co.*, decided by the Supreme Court of the State of Washington, April 23rd, 1914, 37 Wash. Dec. 144, 140 Pac. 549, the court said:

“The testimony of respondents is to the effect that on January 26th, 1913, a bright, sunny day, and about 3:40 P. M., they approached a crossing where the collision occurred, driving about 20 miles per hour. That the top of the automobile was up and the side curtains on the left hand side; that when about 150 to 175 feet away from the crossing they looked up and down the track but saw no car coming, and heard no whistles or other signals from approaching cars; that they did not look again, but reduced the speed of the automobile to about 15 miles per hour, drove onto the crossing, and that as they reached the track, a car, seen then for the first time, came upon them from the left, hitting the automobile at about the front seat.”

And in holding the plaintiff guilty of contributory negligence, the court continued:

“The driver of an automobile approaching such a crossing as the one in this case, must make reasonable use of his senses to guard his own safety, and a failure to do so is negligence. Such a person cannot take a last look at 150 to 175 feet distant from the crossing and then shut his eyes and go blindly forward. While we shall not attempt to say within what distance respondents should have looked for an approaching car before attempting to cross, the law does require that such a look must be taken within such a distance as to enable one to ascertain whether or not there is an approaching car in sight. *Beeman v. P. S. T. L. & P. C.*, 37 Wash. Dec. 107, and cases cited there. Had respondents taken such precaution this accident would not have happened.”



And in the case of *Brown v. P. S. E. Ry., supra*, the court held the plaintiff guilty of contributory negligence for driving out from behind an express van which obstructed his view of an approaching street car, out upon the street car tracks, where he collided with the car.

In *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983, the court held a pedestrian guilty of contributory negligence precluding recovery in walking from behind an express wagon which obstructed her view and in stepping in front of an approaching automobile, without seeing it, notwithstanding the fact that the automobile was being driven at a rate of twenty-five miles per hour. The court said:

"It is apparent that Mrs. Harder was guilty of negligence which caused her injury. She was attempting to cross a busy street at a place where pedestrians were not supposed to cross. She was looking in a direction nearly opposite to the direction she was going. She walked, no doubt, rapidly, for she was hurrying to catch a car. *She emerged from behind an express wagon into the path of vehicles without looking for approaching vehicles. Her negligence is manifest. \* \* \** For a much stronger reason, when she walked from behind the express wagon, where she could not see approaching vehicles and where drivers thereof could not see her, and where she knew that vehicles were likely to approach, it was her plain duty, in the exercise of ordinary care in emerging therefrom, to look in the direction she was going. If she had done this she would have seen the defendant and no doubt have avoided the injury. Her own negligence prevents her recovery, even though the auto was being driven at a rate of twenty-five miles per hour."

In *Steuding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058, the court held a pedestrian guilty of contributory negligence in passing behind a standing street car onto the opposite track without using his senses to ascertain the approach of a car—citing therein many cases from this and other courts. This court used the following language in the above case:

“It has been held in other jurisdictions with similar unanimity that one who passes behind a standing car where there is a parallel track without using his senses, will not be allowed to recover if he is injured by an approaching car. The same rule obtains where the traveler takes observation from a point where he knows that his view is restricted and then heedlessly passes into the zone of danger.”

In the recent case of *Bardshar v. Seattle Electric Co.*, 72 Wash. 200, 130 Pac. 101, the facts are almost parallel to those in the case at issue, and we quote the following part of the decision to show how strikingly similar the two cases are:

“The automobile was proceeding south on First Avenue from Pike Street, approaching Union Street, one block to the south; it was passed by one of respondent’s cars on the west or southbound track. This southbound car stopped on the south side of Union Street to take on awaiting passengers. The chauffeur, desiring to cross First Avenue at Union Street, slowed down his automobile and drove on behind the southbound car, reaching Union Street. He made the turn to the east, as required by an ordinance of the city, by going to the south of the street intersection. At this point he was behind the standing car a dis-



tance variously estimated by appellant's witnesses from fifteen to thirty feet. As the front wheels of the automobile ran onto the west rail of the east or northbound track it was hit by a car coming north and received the damage complained of. The chauffeur testified that, from the time the southbound car passed him in the middle of the block between Pike and Union, there was no car ahead of him and nothing to obstruct his view, and that he could see down First Avenue as far as Pioneer Square, some eight blocks away. His examination then continues:

'Q. How many cars did you see coming? A. I didn't look down that way. Q. You didn't look to see if there were any cars coming? A. No, I did not. Q. You did not observe whether there were any cars coming? A. No. Q. If you had looked you could have seen this car coming? A. I suppose so. \* \* \* Q. Now, you say that you were fifteen or twenty feet, something like that, from the car that was standing still? A. The southbound car? Q. Yes, was it standing still when you started to go across? A. Yes. Q. And it blanketed your view? A. Down First Avenue. Q. Yes? A. Yes. Q. Now, you knew that the cars frequently operated up and down those tracks? A. Yes, I knew that. Q. And that the outbound car come on the opposite track? A. Yes. Q. How far is it between the inbound car track and the outbound track; four or five feet, isn't it? A. Yes, about that. Q. The front of your machine then, if you made a right angle turn and was crossing directly up Union Street, would be on the upbound track before you could see down First Avenue around the standing car? A. Yes.'

"Upon these facts, and others of similar import, testified to by the chauffeur and the other occupants of the automobile, we think the lower court was right in holding they established contributory negligence."



Under the circumstances we submit that respondent was grossly negligent. A glance of the eye would have informed him that the car was approaching. If he had used his senses he would not have run directly in front of a moving car to be struck by it. Reasonable minds guided by a sense of fairness can reach but one conclusion,—that respondent's own gross negligence was the sole cause of his injuries.

*“Nature has provided two senses for personal protection, the use of either of which might have given plaintiff warning of the approaching car; for it is of common knowledge that a trolley car in motion makes, by friction with the track, a noise more or less audible, and that, as the wheel of the trolley pole runs along the wire overhead, a whirring sound is caused, increasing in intensity with the speed of the car. One of the plaintiff's witnesses testified that the car was going at a high rate of speed, and, this being assumed, the whirr must have been noticeable. If the plaintiff had listened he might have heard both of these sounds. So, also, a car in motion has the electric current at work, and, after dark, the electric lamps are lighted. It taxes credulity to believe that, if the plaintiff had either looked or listened, he would not have become aware of the proximity of the car.”*

*Quinn v. Brooklyn City Ry. Co.*, 57 N. Y. Supp. 544, 546.

The great weight of authority sustains the rule that a pedestrian is guilty of contributory negligence if, before crossing street railway tracks, he *fails* to exercise his senses to discover the approach of cars operated by electricity.

*Birmingham Railway etc. Co. v. Oldham*, 141 Ala. 195; 37 So. 452.

*McGee v. Consolidated St. Ry. Co.*, 102 Mich. 107; 60 N. W. 293.

*Wilder v. Detroit United Ry.*, 147 Mich. 537; 111 N. W. 100, and cases cited.

*Hickey v. Railway Company*, 60 Minn. 119; 61 N. W. 893.

*Terien v. St. Paul City Ry. Co.*, 70 Minn. 532; 73 N. W. 412.

*Timler v. Philadelphia Rapid Transit Co.*, 214 Pa. 475; 63 Atl. 824.

*Manos v. Detroit United Ry.*, 130 N. W. 664.

*McGee v. St. Joseph Ry. etc. Co.*, 133 S. W. 1194.

*Cain v. St. Ry. Co.*, 97 Ga. 298; 22 S. E. 918.

*Indianapolis St. Ry. Co. v. Zaring*, 71 N. E. 270; 33 Ind. App. 297.

*Young v. St. Ry. Co.*, 148 Ind. 54; 44 N. E. 927; 47 N. E. 142.

*Beem v. Elec. Ry. Co.*, 104 Ia. 593; 73 N. W. 1045.

*Ames v. Ry. Co.*, 120 Ia. 640; 95 N. W. 161.

*Burns v. St. Ry. Co.*, 71 Pac. 244; 66 Kan. 188.

*Kansas etc. Co. v. Gallagher*, 68 Kan. 424; 75 Pac. 469.

*Hebee v. Light & Power Co.* (La.), 35 So. 251.

*Snider v. Ry. Co.*, 48 La. Ann. 12; 18 S. 695.

*Dieck v. Ry. Co.*, 51 La. Ann. 626; 25 S. 71.

*Cenedo v. Ry. Co.*, 52 La. Ann. 2149; 28 S. 287.

*Moore v. Lindell R. Co.*, 176 Mo. 583; 75 S. W. 672.

*Ries v. Transit Co.*, 179 Mo. 1; 77 S. W. 734.

*Riska v. Ry. Co.*, 180 Mo. 168; 79 S. W. 445.

*Petty v. Ry. Co.*, 179 Mo. 666; 78 S. W. 1003.

*Brown v. Ry. Co.*, 68 N. J. L. 618; 54 Atl. 824.

*McGrath v. Ry. Co.*, 66 N. J. L. 312; 49 Atl. 523.

*Hageman v. St. Ry. Co.*, 74 N. J. L. 279; 65 Atl. 834, and cases cited.

*Thompson v. Buffalo R. Co.*, 145 N. Y. 196; 39 N. E. 709.

*Baxter v. Electric Ry. Co.*, 190 N. Y. 439; 83 N. E. 469.

*Pinder v. Railroad Co.*, 173 N. Y. 519; 66 N. E. 405.

*Smith v. Ry. Co.*, 29 Ore. 539; 46 P. 136, 780.

*Wolf v. Ry. Co.*, 45 Ore. 446; 72 Pac. 329.

*Boring v. Union Traction Co.*, 211 Pa. St. 594; 61 Atl. 77.

*Watkins v. Union Traction Co.*, 194 Pa. St. 564; 45 Atl. 321.



*Tesch v. Ry. & Light Co.*, 108 Wis. 593; 84 N. W. 823.

*Goldman v. Ry. & Light Co.*, 123 Wis. 168; 101 N. W. 384.

*Beerman v. Union R. Co.*, 24 R. I. 275; 52 Atl. 1090.

*Price v. Rhode Island Co.*, 28 R. I. 220; 66 Atl. 200.

*Dunn v. St. Ry. Co.*, 186 Mass. 316; 71 N. E. 557.

*Blackwell v. St. Ry. Co.*, 193 Mass. 222; 79 N. E. 335.

*Fitzgerald v. Ry. Co.*, 194 Mass. 242; 80 N. E. 224.

*Hooks v. Light & Power Co.*, 147 Atl. 700; 41 So. 273.

*Berger v. Rapid Transit Co.*, 141 Fed. 120.

\* \* \* \* \*

And where one *looks* or *listens*, but *fails* to see or hear a car which is plainly visible for some distance, he is nevertheless guilty of contributory negligence.

*Willis v. Boston N. St. Ry. Co.*, 89 N. E. 31.

*Russell v. Minneapolis St. Ry. Co.*, 86 N. W. 346.

*Farese v. North Jersey St. Ry. Co.*, 69 Atl. 959.

*Stassen v. New York City Ry. Co.*, 102 N. Y. S. 468.

*Madigan v. Third Ave. R. Co.*, 74 N. Y. S. 143.

*Newcomb v. Metropolitan St. Ry. Co.*, 74 N. Y. S. 858.

*Nugent v. Philadelphia Trac. Co.*, 37 Atl. 206.

*Mathews v. Rhode Island Co.*, 77 Atl. 865.

So, also, a pedestrian is guilty of contributory negligence, as a matter of law, where he looks only when he is some distance from the track and does not look again for the approach of the car before stepping upon the tracks.

*Wecker v. Brooklyn etc. R. Co.*, 120 N. Y. S. 1020, and cases therein commented upon.

*Denver City Tramway Co. v. Cobb*, 164 Fed. 41.

*Glynn v. New York City Ry. Co.*, 110 N. Y. S. 836.

*Ayers v. Forty-Second St. etc. Ry. Co.*, 104 N. Y. S. 841.

*Morice v. Milwaukee Elec. R. & Light Co.*, 129 Wis. 529; 109 N. W. 567.

*Lynch v. Third Ave. R. Co.*, 85 N. Y. S. 180.

*Klough v. Interurban St. Ry. Co.*, 92 N. Y. S. 733.

*Healy v. United Traction Co.*, 101 N. Y. S. 331.

*Solomon v. New York City Ry. Co.*, 99 N. Y. S. 529.

*Pittsburgh Ry. Co. v. Cluff*, 149 Fed. 732.

*Merritt v. Foote*, 128 Mich. 367; 87 N. W. 262.

*Ross v. Metropolitan St. R. Co.*, 113 Mo. App. 600; 88 S. W. 144.

*Paul v. United Ry. Co.*, 152 Mo. App. 577; 134 S. W. 3.

*Krant v. Public Service Ry. Co.*, 75 Atl. 165.

*Davis v. Detroit United Ry. Co.* (Mich.), 127 N. W. 323.

### ASSIGNMENTS FIVE AND SIX.

The Court erred in refusing to give defendant's requested instruction No. 9, as follows:

"You are further instructed that if the plaintiff thought he had time to cross the track of the defendant company, if he was attempting to cross the track, before the car of the defendant company would reach him, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff and he cannot recover and your verdict must be for the defendant.

The Court erred in refusing to give defendant's requested instruction No. 10, as follows:

"You are instructed that if the plaintiff failed to look and listen and stop if necessary, or to take any reasonable precaution whatever to ascertain whether the car was coming upon the track of the defendant company, then and in that event it was negligence on the part of the plaintiff to attempt to cross the track of the defendant company, if the car of the defendant company was in close and dangerous proximity to the plaintiff."

These two instructions correctly state the law applicable to the facts involved in the case and the court neglected to give any instructions embodying the same principles of law, and the jury were left without proper guidance in the matter.



The first of the above instructions is applicable and should have been given for the reason that the defendant in error himself testified that he heard a car whistle and that he was not in danger of being struck by that car, so he looked in the opposite direction and was in fact struck by the car that whistled. The jury should have been given this instruction for their guidance in arriving at their verdict in respect to this particular phase of the case.

The second instruction above complained of is, we submit, a correct statement of the law, and while the court gave instructions which embodied the same phase of the law as set forth in the above instruction, it did not cover all phases of it, and we submit that the refusal of the court to instruct the jury as requested by the defendant contains reversible error.

Relying upon the belief that this court will follow the decisions of the Supreme Court of this state in so far as they are not in conflict with the decisions of this court, we submit that as a matter of law the defendant in error was guilty of such contributory negligence as to bar his recovery and we respectfully request the court to reverse the judgment with direction to dismiss the action.

Respectfully submitted,

JOHN A. SHACKLEFORD,

F. D. OAKLEY,

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TACOMA RAILWAY AND POWER  
COMPANY, a corporation,

*Plaintiff in Error,*

VS.

ELLING REMMEM,

*Defendant in Error.*

Upon Writ of Error to the United States District  
Court of the Western District of Washington,  
Southern Division.

## Brief of Defendant in Error

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No. 2424.

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Brief of Defendant in Error

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STATEMENT

In this cause, Elling Remmem, the defendant in  
error, complained of the Tacoma Railway & Power  
Company, plaintiff in error, and alleged the cor-

porate existence of the plaintiff in error, and that it was at the times herein alleged engaged in operating a system of street railway in the City of Tacoma, and that defendant in error was at the time a resident of the City of Tacoma; and that on or about December 7th, 1912, at about 6 P. M. of said day, the defendant in error was traveling southward on South Yakima Avenue in the City of Tacoma, and upon arriving at South Sixty-second Street, undertook to cross from the westerly to the easterly side of said avenue, and that while defendant in error was upon South Yakima Avenue and in the exercise of due care on his own part and endeavoring to pass from the westerly to the easterly side thereof, one of the street cars of the plaintiff in error, which was being carelessly and negligently operated in a northerly direction on said avenue, was so carelessly and negligently operated and handled by the employes of the plaintiff in error in charge of the operation of said car that plaintiff was without warning run down, struck and injured by said car. The third paragraph of his complaint alleges the nature of the injuries. The fourth the age of the plaintiff and his earning capacity. The fifth that by reason of the injuries his earning capacity has been cut off and destroyed; and sixth his damages sustained in the sum of ten thousand dollars.

To this complaint an answer was interposed admitting that on December 7th, 1912, plaintiff undertook to cross South Yakima Avenue, was injured by colliding with one of the defendant's street cars,

but denies all the other allegations in paragraph two of the complaint. In paragraph three of the answer it is admitted that defendant in error sustained certain injuries. But all other allegations of paragraph three of the complaint are denied.

An affirmative defense was interposed alleging that the accident admitted to have occurred was occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise.

To this affirmative defense the defendant in error replied denying the same. Issue was thus joined and the cause tried to a jury, and resulted in the verdict and judgment complained of by the plaintiff in error.

## ARGUMENT

The first assignment of error is without merit for the following reasons:

The defendant company was guilty of negligence as shown by the testimony in that the motorman in charge of the street car was operating the same upon the streets of the City of Tacoma without keeping any look out ahead and for a considerable distance while looking back into the car and not looking at all in the direction in which his car was traveling.

See testimony of John E. Timmerman, page 32, Transcript of Record, where he says: "As we hit 64th Street I looked out of the car at the front end, the doors were still working themselves open, and



I noticed the motorman looking back inside of the car over his shoulder, and I looked at him steadily from that time on until I happened to see into the distance a man standing there, as I thought, at the side of the track. I could see this man standing there as I thought he was all the while the motorman was looking back, in fact, I was looking at him, and this fellow was almost in line with me. I supposed he was out of harm's way and thought nothing of it, and I thought I felt the impact of something hitting the car at the same time the motorman turned around and snapped off his power and stopped the car."

Page 33, Transcript of Record. "I did not hear a whistle at any time, and could see a bright head light ahead. I was looking at the motorman."

Also testimony of Mrs. John E. Timmerman, page 35, Transcript of Record, where she says: "I boarded the car with my husband, John E. Timmerman. After the car left 64th Street the motorman was looking back into the car all the while until it felt like he hit something, and he then stopped."

See also testimony of Oren Polley, page 31, Transcript of Record, where he says: "As the car passed I seen the motorman rubbering back at his conductor in the back end. He had his doors open."

He also testified, page 29, Transcript of Record: "I heard a sound and there was this other car coming and he was just about in the center of the track then, and they did not blow a whistle or give a signal

that there was a car coming, and it struck him before he got a chance to get off. Struck him with the corner of the car.”

We respectfully submit that there was therefore the testimony of three absolutely disinterested witnesses to the gross negligence of the defendant company. Negligence in two respects: First, that the motorman was negligent in that he was looking back into the car and not ahead in the direction in which his car was running while operating the same upon the streets of the City of Tacoma; and second, that the motorman was negligent in not seeing the plaintiff upon the track in a place of danger, and giving some kind of a warning to him of the approach of the car. Which testimony abundantly justified the jury, if they believed it, in finding that the defendant company was, at the time of the accident, guilty of negligence.

We further respectfully submit that the allegation of contributory negligence on the part of the defendant in error was not conclusively established by the evidence, but that on the contrary the evidence does fairly establish the fact that the defendant in error was at the time in the exercise of ordinary care on his own part. He was attempting to cross from the westerly side of South Yakima Avenue to the easterly side of the same at a point much used by pedestrians as a crossing and immediately under the rays of an arc street light.

He testified, page 24, Transcript of Record,



“About the time I crossed 61st Street I seen a light that seemed like it was swinging on to the left, striking to the left. I judged it to be on the Alki switch. They call it 65th Street switch on Yakima Avenue. I thought the light was a car going down town going into the switch. I got a little further and a car came along at a good speed and passed me going from town, the same direction I was going. Just a little after she passed me I was about in the center of the block, I heard a blast of the whistle. I thought that a car was coming behind, a tripper, as I knew by the time of night, it was. I thought it was a signal to the car that swung first onto the switch for her to stop and wait until that tripper came up. I walked down until I got to a place where the sidewalk stops, at the place I marked “X” on the photograph, I started to walk across the street to the left as I could not go further on the sidewalk and there was an orchard and a fence in front of me; as I started to cross the street I thought I heard something. I was satisfied that I heard the car coming from the direction of town going south. At that time I was off the end of the sidewalk out in the street. I kept on walking and looked around to see if I could see the headlight of the car. I thought I seen a headlight and other lights, but I tried to get my eyes turned on it, fastened upon the headlight of the street car, and I did not see anything so close to me that I thought there was danger, so I straightened up again and about that time I was on the street car



track, and as I glanced ahead I saw a very short distance from me a street car, and I thought I could make it, and I tried to jump like this, illustrating, and at the same time she struck me and rolled me over, and I landed on my arms underneath. I looked southward all the time I was walking on the sidewalk and saw no street car up to the time that I started to turn out across the street. There was a street light at the place I turned to go across and a path at that point.”

That there was a tripper following the south bound car referred to by the defendant in error and which should have passed the car which injured the plaintiff at the Alki switch, is shown by the testimony of other witnesses.

See testimony of Oren Polley, page 29, Transcript of Record, who testifies in substance that he had been waiting at 64th Street to take a car into the City of Tacoma; that none coming along he had started to walk down to 61st Street to take the car instead of standing and waiting, as it was a wet, cold evening, and that as he was about at 63d Street one of the cars passed him going south toward Fern Hill. That as he had seen the north bound car take the switch at 65th Street or Alki switch, he thought he would have to run to get to 61st Street by the time the car caught up with him. He says, “I was going to run as I thought I would have time to catch it, and then I see this car coming. It was coming from 56th Street and Yakima Avenue. I was watching it over at 56th Street. I thought the trip-

per was coming to follow in the Alki switch. I was watching for these fellows. There was one car went up and there was another tripper at 56th Street, and I supposed it was going to pass it at Alki switch, and therefore I had plenty of time to get it. I expected both cars coming from town were going to pass at Alki switch."

Page 30, Transcript of Record, "In the meantime I seen this gentleman who was hurt coming on the other side of the street right opposite from me, and as he crossed came towards the track. I heard a sound and there was this other car coming, and he was just about the center of the track then, and they did not blow a whistle or give a signal that the car was coming and it struck him before he got a chance to get off, struck him with the corner of the car."

It will thus be seen that Mr. Polley interpreted the movement of the company's cars at the time of the accident exactly as Remmem interpreted them, and believed that the north bound car intended to wait on the Alki switch until the tripper following the south bound car had passed. And that this tripper had approached to the immediate vicinity of the accident at the time the accident occurred, is shown by the testimony of Mr. Timmermann, page 33, Transcript of Record, where he says: "I did not hear a whistle at any time. I could see a bright headlight ahead." This was a single track line, and we respectfully submit that the north bound car that ran down the defendant in error should have



waited at Alki switch until the south bound tripper passed the switch. As Remmem testifies he heard the tripper coming from the city, looked for it, saw the headlight and saw that it was not close enough to hurt. Polley was watching this tripper coming from 56th Street. Timmermann saw a bright headlight ahead at the time Remmem was struck.

It would thus appear that the plaintiff in error was running two of its cars in opposite directions on a single track into head on collision in the immediate vicinity of the place where they ran down the defendant in error, and that this was in fact true is shown by the significant absence of evidence to explain or contradict the same, as not one word of testimony in this regard was introduced upon the trial by the plaintiff in error.

In view of these facts and the undisputed testimony in this case, we respectfully submit that the defendant in error when he undertook to cross over from the west side of Yakima Avenue and the street car track of the plaintiff in error, did just what any prudent and careful man would have done under the circumstances. In view of the fact, as he testifies, "I looked southward all the time I was walking on the sidewalk and saw no street car up to the time I started to turn out across the street." The distance he had to travel is shown by Exhibit—to be about 24 feet before he would be safely across the street car track, and as he turned out his attention was diverted by hearing the tripper coming from toward town, and his time was occupied in looking



for it to see how closely it was upon him, until he had reached the street car track when the north bound car was immediately in front of him, and he jumped but was struck by the corner of the car.

Under the circumstances of this cause defendant in error would have been guilty of negligence had he not done exactly what he did do in attempting to cross this street car track. He had seen the north bound car take the 65th Street or Alki switch. He saw the south bound car pass him, run down to the switch, and heard it give a short blast of the whistle, which he understood to mean that a tripper was following in the block and that the north bound car should wait at the switch for the tripper to pass. He was looking in a southerly direction toward Alki switch as he walked and saw no car leaving the switch. He turned out to cross the street. As he turned out he heard the tripper coming from the north, he looked to see if it was close enough to hurt him. He saw the headlight and that he would have time to make it across the track ahead of it. He was under no obligation to look for a car coming from the south for the reason that the tripper bound south on this single track tied that car to the Alki switch by the strongest tie known in the operation of railways, namely, the duty of the company not to run their passenger carrying cars into head on collision. As was well said by Judge Rogers of the Second Circuit in the case of *New York Lubricating Oil Company vs. Pusey*, 211 Federal, page 622, at page 626:

“But it is necessary in this connection not to overlook the general rule that every person has a right to presume that every other person will perform his duty, and that, in the absence of reasonable ground to think otherwise, it is not negligence for one to assume that he is not exposed to danger which can come to him only from violation of the duty which the other owed to him. Failure to anticipate the defendant’s negligence does not amount to contributory negligence.”

Sustaining the rule thus announced by the citation of many authorities.

Furthermore, the question of whether or not the defendant in error was, in crossing the street as shown by the testimony, in the exercise of ordinary care is always a question for the jury. To quote from the language of Judge Rogers in the case above cited:

“As the law does not require that the plaintiff should have exercised more than such care as ordinarily prudent persons would have exercised under similar circumstances to avoid danger, and as he was only required to exercise that degree of care which could reasonably be expected from one in his situation, we discover no error in the court’s submitting the question to the jury. There are few questions within the whole range of judicial inquiry which are regarded as more



peculiarly and exclusively within the province of a jury than those of negligence. As said by the New York Court of Appeals:

‘The wisdom of the time-honored rule of the common law which refers questions of fact to the jurors, and questions of law to the judge, is not more conspicuous in any class of civil cases, than in those which involve questions of negligence.’ ”

And the Supreme Court of the United States in *Railroad vs. Stout*, 17 Wall. 657, 664, says:

“It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”

Judge Gray of the Third Circuit, speaking in the



case of *Bush vs Hunt*, 209 Federal, at page 171, says:

“It is unnecessary to prolong this discussion of the testimony as it is apparent that, in order to have complied with the defendant’s motion for peremptory instructions on account of contributory negligence, it would have been necessary for the court to have established in its own mind a standard by which to test the alleged negligence of the plaintiff. The real standard being what an ordinarily prudent man would have done under the circumstances, it could only be fixed by the jury, and the court properly submitted the fixing of that standard to its determination.”

*Grand Trunk R. Co. vs. Ives*, 144 U. S. 408, 36 L. Ed 485 at p. 493.

In passing upon the question of negligence, and contributory negligence, it is an axiom of the law that each case must be judged according to its particular facts, circumstances and surroundings, and as well stated in the note to *Pilmer vs. Boise Traction Company*, 15 L. R. A. New Series, at page 259:

“The precise thing which a person should do before attempting to cross the tracks of an electric railway is that which any prudent man would do under the particular circumstances; and the question as to whether un-

der the facts of the given case the plaintiff is guilty of contributory negligence, is for the jury."

Sustaining this rule by the citation of very numerous authorities, several from the Supreme Court of Washington. Among them *Chisholm vs. Seattle Electric Company*, 27th Washington, 237; the facts of which were as follows:

"The testimony of appellant is to the effect that when he left the sidewalk to cross the street he looked for cars, and saw two going south, one nearly opposite him, and one a block away, and did not see any going north. He then proceeded across the street at an ordinary gait, when he was struck by a car going north and run over by said car, which crushed his leg, necessitating amputation. We cannot understand upon what theory the court took the case from the jury, unless upon the theory that it is negligence as a matter of law for a pedestrian to fail to look and listen when he crosses a street car track. But this court has uniformly held that the rule which in that respect applies to steam railroads does not apply to street cars. The rule was again confirmed in a case recently decided by this court: *Burian vs. Seattle Electric Company*, 26th Washington, 606, and on the law announced in that case the judgment in this case will have to be reversed

and the question of negligence under the circumstances submitted to the jury. We have often announced the rule that where circumstances are shown from which different conclusions could be reached by reasonable men, the question of negligence is always one for the jury, and that the judge usurps the function of the jury and commits error when he substitutes his judgment for the judgment of the jury."

This rule announced in the Chisholm case has become the fixed rule in the State of Washington.

We would call particular attention to the case of *Richmond vs. Tacoma Railway & Power Company*, 67th Washington, page 444, where the rule in the Chisholm case is re-affirmed over the strenuous objection of counsel for the plaintiff in error in this case, and where the court says:

"The great weight of authority is to the effect that before a court will be justified in taking from the jury the question of contributory negligence the acts done must be so palpably negligent that there can be no two opinions concerning them."

See also *Blair vs. Seattle Electric Company*, 67th Washington at page 471, quoting the Richmond case and affirming the rule.

See also *Richardson vs. Spokane*, 67 W 621, where the Richmond case is again cited and the rule affirmed.



Also *Merwin vs. Northern Pacific Railway Company*, 68th Washington, at page 622, where the Richmond case is again cited and the rule affirmed.

Also *Hillebrant vs. Manz*, 71st Washington, at page 257, where the Richmond case is again cited and the rule again affirmed.

*Williams vs. Spokane*, 73d Washington, at page 242, citing the Richmond case and affirming the rule.

*Lamoon vs. Smith Cement Brick Company*, 74th Washington, page 164.

*Masso vs. Stanton Company*, 75th Washington, page 220.

*Union Investment Company, vs. Rosenzweig*, 37th Washington Decision, 89, at pages 91-92, where Judge Fullerton says:

“In other words before an affirmative defense can be withdrawn from the jury and determined as a matter of law, the evidence must be clear and convincing and of such a nature that reasonable minds can draw but one conclusion therefrom.”

Citing *Richmond vs. Tacoma Railway & Power Company*, 67th Washington, 444 (Supra.)

Also *Williams vs. City of Spokane*, 31st Washington Decision, page 185, citing and affirming the Richmond case at page 188.

Also *Beeman vs. Puget Sound Traction, Light & Power Company*, 37th Washington Decision, at page 209, where the Richmond case is again cited.

We desire to call particular attention to the Richmond case as it is in this case that the Supreme Court of Washington explains and modifies their holding somewhat to the contrary in the previous cases of *Skinner vs. Tacoma Railway & Power Company*, 46th Washington, 122; *Hellisen vs. Seattle Electric Company*, 56th Washington, 278; and *Fluhart vs. Seattle Electric Company*, 65th Washington, 291. Upon the strength of which counsel for defendant in error argued their motion for a new trial before Judge Cushman in the District Court; and upon which doubtless strongly rely in this court.

This rule of the Washington Supreme Court is in exact harmony with the rule prevailing in the Federal Courts for which no further citation is required than the comprehensive opinion of Justice Lamar in the case of *Grand Trunk Railway Company vs. Ives*, 144 U. S. 408 to 434, Book 36, Law ed., 485.

Under the rule prevailing in the State of Washington the company would be liable to the plaintiff in this case regardless of the plaintiff's negligence. Under the doctrine of the last clear chance; as it was clearly shown that plaintiff was looking northward for the purpose of locating the tripper bound south as he approached the street car track; he was seen by a passenger in the car which injured him, in the immediate vicinity of the track, while the car was yet over a hundred feet away, and had the motorman in charge of this car been keeping a lookout as required he would have discovered and appre-



ciated plaintiff's dangerous position in time to have avoided injuring him.

*Masso vs Stanton*, 75th Washington, 220, at page 228, where Ellis, Judge, says:

"A second situation to which the rule applies is this: where the person in control of such agency, by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the nature of the locality, could have discovered and appreciated the traveler's perilous situation in time, by the exercise of reasonable care, to avoid injuring him, and injury results from the failure to keep such lookout, and to exercise such care, then the last chance rule applies, regardless of the traveler's prior negligence, whenever that negligence has terminated or culminated in a situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him. This last phase of the rule applies whenever injury results from new negligence or from a continuance of the operator's negligence after that of the traveler has so ceased or culminated."

*Grand Trunk R. Co. vs. Ives* (Supra.)

The second, third and fourth assignments of error are fully answered by the argument in regard to the first assignment.



The fifth assignment of error is without merit as there is no evidence in the record to justify the instruction requested, nor does the instruction requested lay down a correct abstract rule of law. The evidence showed that the defendant in error did not see the north bound car which ran him down until he was upon the track and the car immediately upon him. Transcript Record, page 25. And the evidence shows that he thought the danger to be apprehended was from the tripper coming from the north, and that there was no danger to be apprehended from the car on Alki switch for the reason that it would have to remain there until the tripper got by, and that there could be no danger from this source because the company would not, on this single track, run two cars into head on collision.

The sixth assignment of error is without merit as the instruction therein requested was given in substance by the court no less than five times. The court charged the jury:

“Also, it is the duty of the plaintiff to exercise the care that an ordinarily careful and prudent person would for his own safety under the circumstances and surroundings at this time. As I have before defined to you, negligence is want of ordinary care, and ordinary care is that care that an ordinarily careful and prudent person would exercise under like circumstances, and should be proportioned to the peril and danger reasonably

apprehended from a want of proper prudence." T. R. 53.

"You will also take into consideration all the circumstances shown by the evidence whether the plaintiff exercised ordinary care, and among these would be the fact of his crossing the street car track, for the plaintiff was bound to make such use of his faculties, his eyes and his ears, and to conduct himself in the manner that an ordinarily careful and prudent person would before he can recover anything, even if the defendant was negligent, and the very fact that a street car track is dangerous, and if a man does not use his faculties, his eyes and his ears, his liability to be brought into danger is one of the circumstances you are to take into consideration in determining whether he made such use of his faculties as an ordinarily careful and prudent person would at the time of the injury and prior thereto." T. R. 54.

"Before the plaintiff could recover in this suit I think I have already made it plain, but I will repeat it—before he can recover in this suit, he must not have contributed in any way to the happening of the accident by his own negligence or want of ordinary care." T. R. 54-5.

"It is the pedestrian's duty, before stepping on the car track, to make reasonable use of his senses for his own safety to ascer-



tain whether or not a car is approaching, and he does not do so, and that failure on his part contributes to his injury, he cannot recover, even though those operating the car were also negligent, or to state this proposition in another way, I instruct you that if you find that both the plaintiff and the motorman in charge of the car were negligent, and that as a result of such joint or concurrent negligence, that is the negligence of both parties concurrently contributed to the injury and an accident occurred, your verdict should be for the defendant." T. R. 57.

"Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover, and your verdict must be for the defendant.

You are further instructed that it was the duty of the plaintiff to use his senses, his eyes, and ears, to discover the proximity and passage of the car of the defendant company, and his failure to use his faculties as an ordinarily careful and prudent person would do under such circumstances, would constitute contributory negligence and would prevent any recovery by him." T. R. 58.

It will hardly be held that the trial judge is required to repeat and reiterate in his charge to the jury the same thing in as many different varieties



of language as the ingenuity of counsel for the defendant can devise. We feel that the trial judge was exceedingly kind to plaintiff in error when he charged the substance of their requested instruction five distinct times, and we do not think they should be so unkind as to complain of his conduct to this honorable Court when he refused to charge the same thing the sixth time.

*Grand Trunk R. Co. vs. Ives, (Supra.)*

*New York L. E. & W. R. Co. vs. Winters, 143*

*U. S. 60, Law ed. B. 36, pp. 71-80.*

We therefore respectfully submit that the record discloses no error of which the plaintiff in error can justly complain and that the judgment appealed from should be affirmed.

We further submit that the record discloses nothing which would justify the appeal of this cause, and that it is apparent that it was appealed solely for delay, and we therefore ask that the penalty provided by Rule No. 30 of this honorable Court of ten per cent. upon the amount of the judgment in addition to interest be awarded.

Respectfully submitted,

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